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Sheerin N. S. Haubenreich

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Parental Rights in Myspace: Reconceptualizing the State's *Parens Patriae* Role in the Digital Age

by

SHEERIN N. S. HAUBENREICH*

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* J.D. 2008, George Washington University Law School; Associate, Jones Day (Washington, D.C.). Sincere thanks to Professor Catherine Ross and Professor Daniel Solove for generating the inspiration and encouragement to pursue this article and to Adam Haubenreich for enduring the constant revisions. The views expressed herein are those of the author and do not reflect the opinions of Jones Day.

I. Introduction¹

The internet has, in many ways, taken hold of our identities. Google your name and you will discover—especially if you have an unconventional name—your internet doppelganger, created by piecing together fragments of your life: educational history, publications, groups with which you associate, times for those races you ran, the article you wrote in college, a *New York Times* op-ed written on whim, organizations in which you participated, and, horror of horrors, photographs of youthful high jinks. The more time we spend on the internet, in fact, the more we simply exist in this digital age, the more fragments of ourselves will be online for the world to see. Although some of the material on the internet could be embarrassing for adults, today's adults only have internet records dating back about ten years. In contrast, the current generation of teenagers and children has been using the internet for a longer period of their lives, creating a much more comprehensive historical record of their identities that could be damaging to their future reputations. This article identifies and analyzes the resulting risks and offers regulatory and education-based solutions to ensure that the future reputations of today's children and teenagers are protected while still preserving their First Amendment rights to express themselves freely and their parents'² right to guide their children's upbringing.

Since the colonial era in the United States, and arguably since the beginning of civilization,³ the welfare of children has generated bitter conflict between the state and parents. I find that underlying this conflict are two fundamental questions: (1) who is ultimately responsible for a child's education, safety, and health and (2) who decides what defines adequate education, safety, and health. At the heart of the conflict between parents and the state is the struggle to impart values—whether religious, historical, or otherwise—to the child. This struggle has played out most frequently in the contexts of education and social services, where the state has historically assumed a larger role, but has also arisen in the context of exposing children to content perceived to be adult in nature.⁴ In the private

1. I would like to make clear that this article's scope will be narrow—only encompassing the rights of parents who are deemed fit, where the state traditionally, outside of the educational context, has much more limited rights.

2. In this article, I use the term "parent" to encompass both parents and legal guardians.

3. See LESLIE J. HARRIS, LEE E. TEITELBAUM, *CHILDREN, PARENTS, AND THE LAW* (Wolters Kluwer, 2d ed.) (2006) (discussing Roman law of *patria potestas* in which the father had absolute power of life and death over his children and Spartan children, in which children belonged to the state upon birth).

4. See *Ginsberg v. New York*, 390 U.S. 629 (1968); cf. *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

realm, parents generally have a great deal of discretion in how they choose to raise their children, which includes exposing their children to whatever they deem appropriate.⁵ In certain contexts, the state may step in and prevent the child from directly accessing the material the state has classified as inappropriate. However, the Supreme Court said long ago that the state could not prohibit parents from exposing their children to legal adult content.⁶

The dangers of the conventional media addressed in earlier child-harm jurisprudence, such as violent videogames⁷ and print pornography,⁸ differ from the harms on the internet, because the former are somewhat bounded and concrete. Now comfortably ensconced in what many term the “digital age,” this article seeks to reconceptualize the current balance between parents and the state with respect to children in the context of the internet, and specifically online social networks. The peculiar harm of online social networks (“OSNs”)—in particular, the potentially uncontrollable dissemination and long-enduring nature of posted information—is unlike that of any other medium parents and states have faced in the context of children. For this reason, the parents’ right to freely expose their children to certain internet content should not be as broad as with exposure to other legal content. The state and the federal governments should step in to protect children—via education and regulation—from the harms that parents, regardless of how attentive, simply cannot anticipate or guard against.

Part I of this article explores the tension between parents’ rights to expose their children to, and the states’ interest in protecting children from, controversial content. The section begins by surveying the history of parental rights, which are generally broad in relation to the state, and addressing the few judicial exceptions made to the typical deference afforded parents in child-rearing decisions, which fall under what this author terms the “harm standard.” Next, it explores the history of states’ regulation of controversial content for children. The first section concludes by investigating whether parents should have broad authority in exposing their children to internet content, or whether the internet presents certain harms more analogous to cases in which courts have limited parental authority.

Part II turns the paper’s focus to internet-exacerbated and internet-created harms. The section begins by briefly exploring the distinction

5. See *infra* note 9.

6. See *Ginsberg*, 390 U.S. at 639.

7. See *Kendrick*, 244 F.3d 572.

8. See *Ginsberg*, 390 U.S. at 631.

between those harms created by the internet versus those that have always existed, but which the internet has exacerbated. It next reviews existing harms facing children and teens, for which the internet has provided another forum, and also touches upon the benefits of internet use. Finally, it introduces and discusses the internet-created reputational harm, which is at the heart of this paper.

Part III explores possible solutions to address the risk of reputational harm without overly intruding on parental rights or children's First Amendment rights. This article finds that several types of federal regulations, buttressed by federally funded state-education programs, would ameliorate the risks of such reputational harms while respecting parental rights and children's speech rights.

II. Children and Controversial Content: Parents Versus The State

A. A Brief History of Parental Rights

The right of parents to raise their child is rooted in several different theories.⁹ The rights have been referred to as those that existed before the development of the modern state, by virtue of being human.¹⁰ This "sacred" right continued to be recognized as modern laws developed, and governments and courts reaffirmed the interest of parents in the care, custody, and control of their children.¹¹ In 1923, a parochial school teacher, who was teaching German to students, challenged his criminal conviction under a Nebraska statute prohibiting the teaching of foreign languages as violating his Fourteenth Amendment liberty interest in

9. See TEITELBAUM *supra* note 3, at 7 (theories include proprietarianism, blood-ties, interest, and least detrimental alternative) (quoting DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 98 (1993)).

10. See *Troxel v. Granville*, 530 U.S. 57, 91-92 (Scalia, J., dissenting) (explaining the origin of parental rights as being one of the "unalienable rights" protected by the Declaration of Independence, which though arguably not legally binding, still provides a foundation for our civil rights jurisprudence); see also *Lacher v. Venus*, 88 N.W. 613, 617 (Wis. 1922) (describing parents' rights as "an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty and pursuit of happiness, our government is formed.").

11. See, e.g., *Morse v. Frederick*, 127 S.Ct. 2618, 2632 (2007) (recognizing one of the most "sacred duties of parents [as] train[ing] up and qualify[ing] their children for becoming useful and virtuous members of society . . ."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (reaffirming parental rights as "perhaps the oldest fundamental liberty interest recognized by [the] [Supreme] Court"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the parents' right to "establish a home and bring up children.").

employment.¹² The Supreme Court reversed the conviction, but also addressed, in dicta, the concomitant parental rights at issue, by noting that the Due Process Clause includes the rights of parents to “establish a home and bring up children” and “to control the education of their own [children].”¹³ Two years later, the Court spoke to parental rights again, albeit circuitously, when several parochial, private, and military schools challenged an Oregon law requiring public school attendance on Fifth Amendment takings grounds.¹⁴ The Court once again, in dicta, reiterated the “Meyer doctrine” that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”¹⁵ By 2000, in *Troxel v. Granville*, the Court surveyed the history of parental rights and recognized, inaccurately, that the Court had *held* in both *Meyer* and *Pierce* that parents have a fundamental right to the care, custody, and control of their children.¹⁶

Nearly a century of cases, beginning with the foundational *Meyer* and culminating in *Troxel* transformed dicta in seriatim, which touched upon parental rights in various iterations, into an incontrovertible right to raise one’s child in any manner, subject to very few limitations.

B. The State’s Interest in Protecting Children

1. The Harm Standard¹⁷

Although it has been socially accepted that parents have the primary role in shaping their children’s lives, the state has shared this role for quite a long time. States have long imposed age restrictions that trump parental consent governing participation in certain activities, such as, driving vehicles,¹⁸ drinking alcohol substances,¹⁹ and smoking cigarettes.²⁰ Such

12. See *Meyer v. Nebraska*, 262 U.S. 390.

13. *Id.* at 399-401.

14. See *Pierce*, 268 U.S. 510.

15. *Id.* at 534-35.

16. *Troxel*, 530 U.S. at 65-66; see also *id.*, 530 U.S. at 91-92 (Scalia, J., dissenting) (arguing that there is an unenumerated parental liberty and any claim to it being a fundamental right does not pass muster in the post-substantive due process era, during which the two major cases were decided).

17. Throughout this article, I refer to the “harm standard,” which is a phrase I use to describe the standard developed in *Prince v. Massachusetts*, 321 U.S. 158 (1944) and its progeny as an exception to the general deference given parents in raising their children.

18. Most states do not let children under the age of sixteen obtain a driver’s license, and no state allows a full license for anyone under age fifteen. See, e.g., California, available at http://www.dmv.ca.gov/teenweb/dl_btn2/dl.htm.

19. All states have some iteration of laws prohibiting selling, furnishing, or giving alcohol to minors under the age of twenty-one. See, e.g., FLA. STAT. ANN. tit. 34, ch. 562.11 (West 2006); ARK. STAT. ANN. tit. 16, ch. 126 (West 2006).

regulations were less controversial, because they did not implicate children's constitutional rights to participate in such activities, but rather the balance between the state and parents in raising children. The courts, while recognizing the parent's role, have contemporaneously recognized that states share authority over children, by upholding, for instance, compulsory education laws,²¹ regulations prohibiting child labor,²² and regulations prohibiting the sale of adult material to minors.²³ Further, courts empowered states to remove children from parents' authority when the parents were abusive, neglectful, or otherwise incapable of providing the child with appropriate care.²⁴ Such authority, which gained potency post-*Lochner v. New York*, 198 U.S. 45 (1905) and the substantive due process era, was grounded in the states' police powers to provide for the public health and general welfare and granted states substantial leverage in the realm of economic and social regulations.²⁵

The common thread, with the exception of the child abuse and neglect cases,²⁶ appears to be that all the cases involved situations where the parents' choices were outside the privacy of their home, triggering the state's police powers.²⁷ There is, however, something more to allowing the state to override parental authority. One of the first cases to recognize, at least implicitly, that the state could override the wishes of citizens—including parents—in certain situations was *Jacobsen v. Massachusetts*, in which the Supreme Court upheld state regulations requiring immunization.²⁸ The case involved an adult who was challenging an exception to the requirement for children with weak constitutions on equal protection grounds.²⁹ The Court emphasized first that children and adults

20. Every state imposes penalties for sale of cigarettes to minors, because of health concerns. See, e.g., ME. REV. STAT. ANN. tit. 22, § 1555 (1997); COLO. REV. STAT. ANN. §§ 24-35-503, 24-35-506 (2001); see also <http://slati.lungusa.org/state-teml.asp?id=6> (last visited April 25, 2008, 4:19 pm EST) (shows state survey of smoking prohibitions).

21. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1942).

22. See *Muller v. Oregon*, 208 U.S. 412.

23. See *Ginsberg*, 390 U.S. 629.

24. See *In re P. Children*, 149 N.H. 129 (N.H. 2003) (neglect); *In the Interest of C.F.*, 708 N.W.2d 313 (S.D. 2005) (physical abuse).

25. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

26. As previously noted, this paper will not address situations involving child abuse and neglect because, given the clearer nature of the harm to the child, questions of state authority are not quite as murky, or are not murky in the same manner. States are not only empowered to intrude into family life, they are permitted to drastically change the makeup of the family by terminating parental rights and placing a child in foster care—whether permanent or temporary.

27. See, e.g., *Ginsberg*, 390 U.S. 629. Cf. *Kendrick*, 244 F.3d 572.

28. *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905).

29. *Id.*, 197 U.S. at 14.

are not similarly situated for the purposes of the Equal Protection Clause,³⁰ and further recognized the state's authority, under its police powers, to mandate such immunizations, presumably irrespective of whether the child's parent allowed it, for the public health.³¹

Later, in *Prince v. Massachusetts*, the Court expressly recognized the state's authority to act as primary decision-maker for a child, under its police powers, if the child was seen to be in harm's way.³² *Prince* involved a Jehovah's Witness who was prosecuted under a Massachusetts law prohibiting children from selling products—an iteration of the child labor laws—because she and her niece were distributing free, religious pamphlets on a weeknight.³³ Despite the attenuated connection between the statute and the child's actions, as well as the weighty nature of the religious claim at stake, the state's sub rosa concern that the girl would fall prey to street life convinced the Court to uphold the law.³⁴ The state's concern that the child might be harmed at some time in the future, regardless of how conjectural, was held sufficient to justify overriding not only the parent's liberty interest in the care, custody, and control of her child, but also religious freedoms associated with the parent's choices. This deference to the states did not seamlessly translate to the speech context. The courts have been more reluctant to allow the state to trammel on First Amendment freedoms, even when the state was attempting to protect children from controversial content that could harm them.

2. *The State's Interest in Shielding Children From Controversial Content*

Our country has a long history of the government protecting children from controversial content,³⁵ running the gamut from materials distributed by peers in school,³⁶ print materials,³⁷ audiovisual entertainment,³⁸ and

30. *Id.* at 12-14.

31. *See Id.* at 24-25.

32. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

33. *Id.* at 159-60.

34. *Id.* at 170.

35. A precise definition of "controversial" is elusive; however, in this article, it generally encompasses speech that remains protected by the First Amendment, but that some people find to be inappropriate for children.

36. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (student-written articles in school newspaper); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (student government campaign speech).

37. *See, e.g., Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (books); *Ginsberg*, 390 U.S. 629 (1968) ("girlie" magazines).

38. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding FCC order regulating indecent language during radio broadcasts); *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (finding rap music to be protected speech).

computers.³⁹ Because such regulations, despite their special focus on children, presumptively raise First Amendment issues, the jurisprudence has been complicated.⁴⁰ The Court has recognized the need for a state to demonstrate a compelling governmental interest and a narrowly tailored regulation; however, it generally avoids any meaningful exploration of the states' proffered interest.⁴¹ However, in *Turner Broadcasting System, Inc. v. FCC*, the Court styled a three-part test for regulating speech based on a proposed interest in protecting children.⁴² The state must show that (1) children's social, moral, or emotional development is at stake, (2) that the speech is the direct cause of the risk, and (3) restricting the speech will in fact reduce the risk of harm.⁴³ In other words, a state cannot regulate protected speech for the abstract purpose of protecting children.⁴⁴

States generally offer two justifications for protecting children from controversial content, to support parents in controlling what their children are exposed to and an independent interest in development of children.⁴⁵ With respect to the first interest, parental support, there are frequent conflicts, because the state and parents do not always have common interests.⁴⁶ Thus, supporting parents, *per se*, cannot be a sufficient justification unless the state is able to show that the parents actually want the support, because parents, as noted above, have independent constitutional rights in guiding their children's development.⁴⁷

The second justification is an independent interest in the development of children, which can be further divided into three categories: regulation of child abuse and neglect, regulation in schools, and the regulation of juvenile behavior legal for adults. As noted above in Part I.B, the state has historically had the broadest authority when it comes to physical or

39. See Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children From Controversial Speech*, 53 VAND. L. REV. 427, 439 n.40 (2000) (discussing the concern surrounding the internet and harms posed to children and states' responses).

40. See Ross *supra* note 39, at 429-30.

41. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 864 (1997) (overturning the Communications Decency Act as being overbroad and reiterating that an abstract interest in protecting children does not, *per se*, pass constitutional muster First Amendment purposes without analyzing state's asserted interest). See also Ross *supra*, note 39, at 430-31 on which this point is grounded.

42. See *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994).

43. See *id.*

44. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 686 (1968).

45. See Ross *supra* note 39 at 435.

46. *Id.* at 475-76. Professor Ross identifies three categories of families—imperfect normative family, a nonconformist family, and an idealized normative family—in her article, which further reinforces the weakness of the states' interest, *per se*, in supporting parents, which relies on a false presumption of conformity between state and parental interests.

47. See Ross *supra* note 39, at 475-76.

emotional harm to the child.⁴⁸ Long predating the *Prince* case, states have exercised their police powers to remove children from their home for neglect or abuse. Our country has a long history of states protecting needy children.⁴⁹ In the nineteenth century, private organizations cropped up as predecessors of foster care to care for children of poor and immigrant parents.⁵⁰ These organizations would investigate reports of child abuse and neglect, file complaints against perpetrators, and aid courts in prosecution of complaints—the broad concern was rescuing children from unhealthy environments. By the early twentieth century, there was an attitude shift toward assisting parents to care for their children by providing services.⁵¹ Three federal statutes currently comprise the welfare regime under which states are required to proceed in order to get federal funding, and serve to buttress the states' authority in protecting children from abuse and neglect.⁵²

Public education is another context in which the Court has traditionally given a great degree of leeway to the states. Many conflicts arise between parents and the state within the public school context, because all fifty states have compulsory education laws, requiring attendance at a state-accredited school or state-approved home-schooling.⁵³ Although a state's authority is not unlimited,⁵⁴ it is quite broad.⁵⁵ It is well-settled law that courts will generally defer to state boards of education in their curricular decisions, very rarely allowing parents' desires to prevail.⁵⁶ Despite the

48. See Adoption and Safe Families Act (1997), Adoption and Child Welfare Act ("ASWA"), and Child Abuse Prevention and Treatment Act (1974); TEITELBAUM, *supra* note 3, at 614 (noting that all states have statutes requiring suspected abuse or neglect to be reported to the police or to the state child welfare agency); see also *supra* note 24 and accompanying text.

49. See TEITELBAUM *supra* note 3, at 629-33.

50. Such concerns were sub rosa in the *Prince* decision.

51. See White House Conference on Children (1909) ("No child should be removed from the home unless it is impossible so to construct the family conditions or to build and supplement the family resources as to make the home safe for the child.").

52. See, e.g., Adoption and Safe Families Act (1997) (Pub. L. 105-89), Adoption Assistance and Child Welfare Act of 1980 (Pub. L. No. 96-272), and Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101, *et seq.* (1974).

53. Donya Khalili, *Off the Grid: Vaccinations Among Home-Schooled Children*, 35 J. L., Med. & Ethics 471, 471 (2007).

54. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a Louisiana law requiring creation science to be taught whenever a teacher taught evolution as unconstitutional under the First Amendment).

55. See *Hazelwood*, 484 U.S. 260 (holding that the school has the authority to filter content within a school-sponsored, student-written newspaper so long as legitimately related to pedagogical concerns); *Fraser*, 478 U.S. 675 (holding that a school board has the right to censor content deemed inappropriate for the students).

56. See, e.g., *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003). Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Barnette*, 319 U.S. 624.

fact that parents are not required to send their child to the state's public schools, the choice is artificial for many, because obstacles—whether financial, intellectual, or otherwise—exist to sending their child to private or parochial schools. It could be argued therefore that the state controls the children's upbringing during school hours, and the parents must settle for before and after school. Frequently, though, the line between school and home is not so easily delineated. Parents must address school issues that conflict with their child-rearing decisions and schools must likewise address parental choices that conflict with curricular decisions.⁵⁷

Finally, states have also tried to regulate juvenile speech that is legal for adults and falls outside the school and abuse contexts. This article focuses on this context, because it is very challenging to strike a sensible balance between parental rights and state interests with respect to children's exposure to controversial content. It is the area in which the stricter evidentiary showing required by the Supreme Court's *Turner* test comes to the forefront, and the states confront the most protected realm of parental rights.

An early case tackling children's access to controversial content was *Ginsberg v. New York*, where the Supreme Court upheld a New York statute prohibiting the sale of legal pornography⁵⁸ to minors without parental consent, under the same harm standard developed in the earlier line of cases. Although the content was protected by the First Amendment for adults, the Court upheld the legislature's conclusion that it was obscene as to a child and as such, was outside the First Amendment protections for children. Thus, the special vulnerability that children possessed allowed a broader definition of obscenity for children than for adults.⁵⁹ The Court further justified its decision by noting that the law did not tread upon parents' liberties, because it did not prohibit parents from purchasing the material and giving it to their child.⁶⁰ The Court carefully delineated the line between the private and public realm by re-emphasizing the parents' interest in exposing their child to whatever legal material they choose.⁶¹ It is only when the state finds a potential harm to the child that parents may

57. See, e.g., *Tinker v. Des Moines Sch. District*, 393 U.S. 503 (1968) (student speech); *Leebaert*, 332 F.3d 134 (curricular decisions).

58. In *Ginsberg*, the legal pornography was not considered obscene as to adults, but rather encompassed by a new definition of obscenity, which the state legislature crafted for children.

59. Compare *Miller v. California*, 413 U.S. 15, 24 (1973), with *Ginsberg*, 390 U.S. at 641 (noting that "[w]hile supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation.").

60. *Ginsberg*, 390 U.S. at 639.

61. *Id.*

not be capable of ameliorating, that it may permissibly step in to address the issue.⁶² Moreover, the Court added that that the harm need not be proven by “scientifically certain criteria,” it simply cannot have been disproven.⁶³

In 2000, Judge Richard Posner in *American Amusement Machine Ass’n v. Kendrick* offered a more standard take on child-harm jurisprudence involving potentially protected speech by striking down an Indianapolis ordinance, which prohibited minors from entering into arcades housing “violent videogames” without parental supervision.⁶⁴ At the threshold, he differentiated between the sexual content at issue in *Ginsberg*, which was unprotected by the First Amendment, and the violent speech at issue in *Kendrick*, which was protected speech and afforded strict scrutiny.⁶⁵ Although the law was substantially similar in scope and foundation as the New York statute in *Ginsberg*, Judge Posner argued that the harm present in controversial sexual content was much graver than that present in violent videogames, which explains why the former is not protected by the First Amendment whereas the latter is.⁶⁶ He further elaborated by describing our civilization as having a violent history and expressed concern for shielding our youth from the realities of the world.⁶⁷ He argued that exposure is necessary to gradually acclimate our youth to some of the horrors they will likely face upon maturation, as opposed to sheltering them until age eighteen upon which they would be deluged by reality.⁶⁸

Thus, the “constitutionally protected” relationship between parent and child would sometimes have to yield even with respect to speech affecting religion and matters of conscience.⁶⁹ Ultimately, although the parents have the primary responsibility for their child’s welfare, parental authority would always be tempered by the states’ authority to regulate the family in the public interest.⁷⁰

62. *Id.*

63. *Id.* at 642-43.

64. *Kendrick*, 244 F.3d 572.

65. *Id.*, 244 F.3d at 576-77.

66. Compare *Winters v. New York*, 333 U.S. 507 (1948) (holding that violent speech is protected under the First Amendment) with *Miller*, 413 U.S. at 24 (1973) (defining obscenity as “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value” and holding that it is not protected by the First Amendment).

67. *Kendrick*, 244 F.3d at 577-79.

68. *Id.*, 244 F.3d at 577.

69. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

70. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

3. *Children's Constitutional Rights and the Internet*

Next, I will examine the history of children's First Amendment rights, as it provides the closest constitutional analogue to rights attendant to internet use. It is important to note, however, that the Supreme Court has considered children's rights in a variety of other settings.⁷¹ It was not until the 1940s, in *West Virginia Board of Education v. Barnette*, that children were considered as independent persons by the law, rather than merely an appendage of their parents, in our federal court system.⁷² Given the unique vulnerability of children, however, their rights functioned differently than those of adults, and as such, states had wider leverage to restrict children's actions.⁷³ In the 1960s, the Supreme Court began to define the constitutional rights of children.⁷⁴ In *Application of Gault*, the Court held that a fifteen-year-old boy had access to the same constitutional right as adults to due process of law in juvenile delinquency proceedings.⁷⁵ Shortly thereafter, the Court recognized, in the landmark *Tinker* case, that children "do not shed their constitutional rights at the schoolhouse gate" and are "persons under the Constitution . . . possessed of fundamental rights which the state must respect."⁷⁶ That same year, the Court reminded us how different children's rights are in *Ginsberg*, which held that a state could permissibly broaden the definition of obscenity for children and thus regulate the distribution of certain protected speech.⁷⁷

Subsequently, children's First Amendment rights were recognized as reduced in the school context. The Court held in *Bethel School District v. Fraser* that public school officials may permissibly censor a student's speech it deemed inappropriate for the other students, analogizing to the *Ginsberg* case.⁷⁸ Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court held that public school officials would not offend the

71. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (unconstitutional to require parental consent for a minor to obtain an abortion); *Parham v. J.R.*, 442 U.S. 584 (1979) (constitutional to allow parent or guardian to voluntarily commit child without child's consent); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (minors have right to contraception).

72. See *Barnette*, 319 U.S. 624 (1943).

73. See *Prince*, 321 U.S. 158, 166-67 (1944) (recognizing that children have constitutional rights but they function differently than adults); see also Charlene Simmons, *Protecting Children While Silencing Them: The Children's Online Privacy Protection Act and Children's Free Speech Rights*, 12 Comm. L. & Pol'y 119, 129 (2007).

74. See Simmons, *supra* note 72.

75. See *Gault*, 387 U.S. 1, 13 (1967) (holding that, under the Constitution, minor has same access as adults to notice of charges against him, right to counsel, right to confrontation and cross examination of witnesses, and to privilege against self-incrimination).

76. See *Tinker*, 393 U.S. 503, 505, 511 (1968).

77. See *Ginsberg*, 390 U.S. 629 (1968).

78. See *Fraser*, 478 U.S. 675 (1986).

First Amendment by controlling the style and content of a school-sponsored, but student-run newspaper, if the restrictions were “reasonably related to legitimate pedagogical concerns.”⁷⁹ The Court recognized, though, that there is a significant difference between the rights of students in the classroom and outside of school.⁸⁰ So, perhaps there would be a significant difference between a child using the internet at school as compared to his home.

There have not been many cases relating to children’s right to use the internet, *per se*. In 2002, the Pennsylvania Supreme Court decided in *J.S. v. Bethlehem School District* that a public school could permissibly restrict a student’s internet use, if it had a substantial-enough effect on the school that it could be considered as being “on-campus” activity.⁸¹ If other courts follow Pennsylvania’s broad holding, then most children who attend public schools and use the internet at home to communicate with other students may already have very limited First Amendment protections. On the other hand, one could view the current jurisprudence as limiting children’s rights in only specific situations, such as in a school setting or where the state shows serious harm. As such, the state would not have very much control over children’s internet activities outside school unless the state could show harm that rose to a high-enough level to override children’s First Amendment rights, whatever those may be.

4. *How the Internet has Changed the Landscape*

The decision to allow one’s children access to the internet is completely distinct from allowing them to flip through a *Playboy*, view a rated ‘R’ film, or even sample a sip of your Bordeaux in the privacy of your home. The internet, by its very nature, is public, regardless of whether the user is actually *in the public*. In the early stages of the world-wide-web boom, when individuals referred to “Internet” as though it were an actual being emanating in the ether, its reach was incomprehensible. Now, as the internet has become more pedestrian, there is a much clearer understanding that as you browse your favorite news site, you are inhabiting, albeit metaphysically, far more than the desk chair situated in the privacy of your home. You could be in many places simultaneously, sporadically traversing across the globe with a click of your mouse—as your internet service provider may be located in another state, the website

79. See *Hazelwood*, 484 U.S. 260 (1988).

80. *Id.* at 273.

81. 807 A.2d 847 (Pa. 2002) (holding constitutional a student’s suspension for creating a website on home computer, entitled “Teachers Sux,” which he accessed and aimed at the specific school, because it was considered on-campus where school had wide regulatory leverage).

could be based on another continent, and its internet service provider in yet another country.

The internet has become so commonplace that it is no longer limited to adults; in fact, children use it at least as frequently as adults.⁸² The increasing number of children using the internet, often without parental supervision, has led to burgeoning concerns about the potential harms to which they were being exposed, especially with regard to sexual content and privacy violations.⁸³ Thus, as the internet expanded, jurists and lawyers struggled to apply existing laws, drafted for the physical world, to the digital world. Existing laws were an imperfect fit, but the harms to children were immediately apparent.⁸⁴ As a result, Congress began drafting laws in the early stages before it fully understood the internet's labyrinthine quality.

The internet is largely regulated by the federal government, because of constitutional restrictions on the role of states.⁸⁵ Internet activity, as noted above, is very difficult to pin down to a precise location and much more often than not spans across multiple locations: intrastate, interstate, and international. Although states tried to draft laws, the laws did not pass constitutional muster, because they were generally found to burden interstate commerce, unless drafted very narrowly.⁸⁶ Thus, Congress took

82. Michele J. Fleming, Shane Greentree, Dayna Cocott-Muller, Kristy A. Elias, and Sarah Morrison, *Safety in Cyberspace: Adolescents' Safety and Exposure Online*, 38(2) Youth & Society 135, 136 (Dec. 2006).

83. Consider recent bills attempting to regulate online social networks because of fears about child predators and other sexual content, such as the Deleting Online Predators Act of 2006 (DOPA), which proposed to ban the use of social networking sites in public schools and libraries. See, e.g., *Sexual Exploitation of Children Over the Internet*, Staff Report, Committee on Energy and Commerce, U.S. House of Representatives, 109th Congress, January 2007.

84. Consider, for instance, Senator Byrd's remarks before the internet was even nearly as socially pervasive that "[t]he political and social environment in which parents must today raise their children is, unfortunately, an environment in which anything goes Profanity, vulgarity, sex and violence are pervasive in television programming, in the movies, and in much of today's books that pretend to pass for literature. The [n]ation is inexorably sinking toward the lowest common denominator in its standards and values. Haven't we had enough?" See 144 CONG. REC. S10,110 (daily ed. Sept. 9, 1998) (statement of Sen. Byrd).

85. This includes the Dormant Commerce Clause and the Affection Doctrine. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (broadly interpreting the Commerce Clause to cover intrastate activity that substantially affects interstate commerce and thus creating the Affection Doctrine); *United States v. Jeronimo-Bautista*, 425 F.3d 1266 (10th Cir. 2005) (expanding the scope of Congress's authority to cover intrastate crimes involving the internet, by applying the Affection Doctrine broadly to computer crimes). Note also that obscenity laws have not faced the same problems, although the "community standards" element of obscenity, which is part of most state statutes, is not the same in every geographical location.

86. See *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (holding unconstitutional, under the Commerce Clause, New York state law that criminalizes dissemination of obscene sexual materials to minor using a computer communication system);

the reins on regulating the internet to protect children, focusing its attention initially upon the regulation of sexual content.

To address fears that children could easily access or be exposed to controversial sexual content on the internet, in 1997, Congress passed the Communications Decency Act ("CDA"), which barred both indecent and patently offensive speech without defining either term.⁸⁷ Further, it did not include an exception for speech with "literary, artistic, political, or scientific value," as required to fall outside First Amendment protections. Despite the statute's germane purpose in protecting children, the Court struck it down as being overbroad in *Reno v. ACLU*.⁸⁸ In 1998, Congress passed the Child Online Privacy Protection Act ("COPPA"), which, completely unrelated to pornography, prohibits the collection of personal information from children under twelve without parental consent.⁸⁹ Shortly thereafter, Congress re-drafted the CDA to comport with the Court's decision, renaming it the Child Online Protection Act ("COPA"). The statute was held unconstitutional in *ACLU v. Reno*, because, in regulating speech directed at or available to minors, it interfered with protected adult speech.⁹⁰ In 2000, Congress passed the Children's Internet Privacy Act ("CIPA"), which requires public libraries and schools that receive federal funding to implement and enforce technology measures that block obscenity, child pornography, and other material harmful to minors.⁹¹ CIPA did not face the same constitutional constraints, because the federal government has more discretion to impose conditions on federal funding, and it did not overburden protected adult speech.⁹² Unfortunately, because much of the content Congress wanted to protect minors from accessing is intertwined with protected adult speech, it has proven very difficult to regulate internet communications, unless the content is outside the First Amendment protection, such as regulations on child pornography.⁹³ Just as

People v. Hsu, 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000) (upholding state law prohibiting the dissemination of "harmful matter" to a minor "with the intent of seducing" the minor, because it was sufficiently narrow to take it out of Commerce Clause).

87. See Communications Decency Act, formerly 47 U.S.C. § 223, et seq. (1994).

88. *Reno v. ACLU*, 521 U.S. 844, 864 (1997).

89. See 15 U.S.C. § 6501-6505 (1998).

90. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

91. See CIPA, 47 U.S.C.A. § 254(h). The statute also amended the Elementary and Secondary School Act of 1965 to prohibit the use of federal funds to purchase computers of internet use unless the school fully complied with CIPA regulations.

92. See *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003) (upholding CIPA because it does not induce public libraries to violate the Constitution, does not overly burden adult speech and expression, and there is a substantial government interest in protecting minors from accessing dangerous sexual content).

93. See, e.g., *Reno v. ACLU*, 521 U.S. 894 (1997) (striking down portion of the Communications Decency Act, which prohibited users from using the internet to communicate

frequently, however, courts recognized that further technological advancements would not only enable a clearer understanding of the harms associated with the internet, but also lead to statutes that could constitutionally regulate internet content.⁹⁴ That said, it was not just the rights of other individuals that were being implicated, it was also the rights of parents to expose their children to, or children, themselves, to access, certain content on the internet.

Presently, because much of children's activities on the internet involve protected speech and expression, parents have broad authority to expose their children to internet content.⁹⁵ As noted above, courts upheld regulations of areas in which the real world law applied clearly to the digital realm, such as children's access to internet pornography. Other areas, however, are much murkier, because the activity does not seem as susceptible to real-world jurisprudential analogies. In many cases, the perceived internet dangers to which children are subjected are not unlike the quotidian dangers faced by children in the real world, both at present and in generations past.⁹⁶ Thus, before determining whether special types of regulations are necessary on the internet and, if so, what kind, it is important to clarify the difference between those harms that are truly unique to the internet and those harms that are omnipresent, regardless of whether they are dressed in digital form.

material deemed patently offensive to minors as encompassing too much protected adult speech); *Psinet v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001) (striking down Virginia statute prohibiting the sale, rental, or loaning to juveniles of, inter alia, material that, taken as a whole, is harmful to minors). Also consider the Child Pornography Prevention Act, 18 U.S.C. § 2256. But, in the 2002 *Ashcroft v. Free Speech Coalition* case, the Supreme Court struck down several provisions of the law, which prohibited virtual images of child porn, as being overbroad. The Court concluded that because current obscenity laws could capture any problematic "virtual child porn," there was no need to carve out new prohibition.

94. See, e.g., *Psinet*, 167 F. Supp. 2d at 881.

95. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

96. See Adam Thierer, *Social Networking and Age Verification: Many Hard Questions; No Easy Solutions*, Progress of Point, 10-11 (March 2007). Note also that, according to a 2003 National Institute for Education Statistics survey, internet use among children from nursery school through fifth grade steadily increases from approximately 23 percent to 50 percent. See *Rates of Computer and Internet Use by Children in Nursery School and Students in Kindergarten Through Twelfth Grade: 2003*, National Institute for Education Statistics, available at <http://nces.ed.gov/pubs2005/2005111.pdf> (June 2005). Internet use is only increasing, and presently the numbers are likely much higher.

III. Internet-Exacerbated Harms Versus Internet-Created Harms

A. The Online Behavior of Children and Teenagers

Twenty-one million children, aged twelve to seventeen, use the internet, which comprises eighty-seven percent of this age bracket.⁹⁷ In many ways, the internet is just another forum for kids to be kids—everything they would already be doing in the school cafeterias, playgrounds, malls, movie theatres, has simply taken a new stage. The harms and the benefits are no different from those that existed before the internet, such as socializing, gossiping, identity-development, bullying, flirting, dating, and experimentation with sex, drugs, and alcohol.⁹⁸ The internet simply exacerbates them—elevating the behavior into a faster paced, information-heavy, digital realm—without dramatically changing them. Thus, our current parental rights jurisprudence applies with respect to legal behavior and activities, and parents have wide discretion to determine the extent to which they want to allow their child to use the internet.⁹⁹ Further, regulations on children's broad internet activity would likely run into First Amendment issues, as discussed above. Nevertheless, some of the internet activity of children and teenagers poses a threat to their reputations, which is an internet-created problem. This author contends that the threat of reputational harm is sufficient to shift the balance of authority from parents to the states in regulating children's internet behavior without impermissibly impacting children's First Amendment rights.

1. *The Benefits of Children and Teenager's Internet Use*

The sheer volume of information to which the internet exposes individuals can lead to many benefits. Youth have the opportunity to educate themselves about anything from academic pursuits, like a history paper or college research, to more emotionally challenging issues, like questions regarding sexuality and depression. Many emotional issues for teenagers arise from the fact that they often have no one they can confide in about the myriad changes occurring internally and externally. The internet, OSNs in particular, provides a beneficial outlet for children to engage each other and develop their identities.

97. See Fleming, *supra* note 82.

98. See Susan Kosse, *MySpace is Also Their Space: Ideas for Keeping Children Safe from Sexual Predators on Social Networking Sites*, 11-16, available at <http://ssrn.com/abstract=989042> (July 25, 2007).

99. See *supra* Part I.

Before a child even sets up a profile, she must think about how she wants to present herself to the world, in selecting a profile name. The process is as follows: Once she has a profile, she would encounter blank "About Me," "Who I'd Like to Meet," "Interests," "Movies," "Music," "Television," "Books," and "Heroes" boxes to fill in the "Interests & Personality" section.¹⁰⁰ She can further define herself in the "Basic Info," "Background & Lifestyle," sections, indicating such things as her body type (including height), educational background, religious beliefs, relationship status, and plans for marriage and children.¹⁰¹ Of course, to top off the massive informational divulgence, she can add albums of pictures to her profile for either public or private viewing, after which she could decorate her profile page with various backgrounds, music, and art.¹⁰² The multifarious steps to creating a profile can take hours, and that time spent thinking about who she is as a person can be extraordinarily valuable to her personal development.

Once the profile is created, the user is able to seek out like-minded friends, both known and not yet known. By identifying herself with certain interests—ranging from the band U2 or volleyball to sexual preference or religious belief—she has already channeled herself into groups of individuals who share similar interests. Sometimes it is very difficult for children to acclimate to the complicated social terrain of schools, and OSNs provide them with indispensable connections, so they do not feel isolated. Further, for better or worse, because many OSNs are not heavily monitored by parents, children feel safe experimenting with independence and personal expression.¹⁰³ Finally, the anonymity of social networks allows children the opportunity to escape the stereotypes and images with which they may have been labeled in school or their community.¹⁰⁴

2. *The Internet-Exacerbated Risks of Children and Teenager's Internet Use*

Even the most vigilant parents have difficulty attempting to protect their child from certain information, as other sources, such as the child's peers, tabloids in the supermarket lines, and even the morning news are often insurmountable and unpredictable obstacles.¹⁰⁵ The beauty of

100. MySpace.com

101. *Id.*

102. *Id.*

103. *See Kosse supra* note 98.

104. *Id.*

105. This author would like to note that perhaps these obstacles explain why some educated and digital-savvy parents are taking a luddite tack on child-rearing, by maintaining a television- and computer-free household, and some grocery stores provide tabloid- and often candy-free check-out aisles.

children is that everything is a new experience for them, and most parents want to preserve challenging concepts and experiences—for instance, regarding sex, drugs, divorce, war, and death—until they perceive their child is “ready.” As Alan Garfield points out, “[t]he notion that children need to be sheltered from inappropriate speech long predates Janet Jackson’s ‘wardrobe malfunction’ or Bono’s expletive-enhanced acceptance of a Golden Globe. Plato expressed concern about youths’ impressionable minds 2300 years ago, stressing that the tales the ‘young first hear should be models of virtuous thoughts.’”¹⁰⁶

The internet appears to present a greater challenge, because there is a striking disconnect between parents and their children’s understanding of it.¹⁰⁷ The average parent now began using the internet at youngest, when they were in mid-adolescence, while their own children have been using it since elementary school. So, the harms that children are facing on the internet—access to inappropriate content, sexual predators, and cyberbullying—seem new and more frightening when in fact, they are no different from the risks current parents faced at the burger joints, roller rinks, shopping malls, and video arcades of their childhood, over which their own parents fretted.¹⁰⁸ As University of North Carolina journalism professor Margaret Blanchard noted:

[P]arents and grandparents who lead the efforts today to cleanse today’s society seem to forget that they survived attacks on their morals by different media when they were children. Each generation’s adults either lose faith in the ability of their young people to do the same or they become convinced that the dangers facing the new generation are much more substantial than the ones they faced as children.¹⁰⁹

Although controversial content and other dangers may be easier to access and more voluminous on the internet, few of the harms that arise out

106. Alan Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565, 566 (2005).

107. See Thierer *supra*, note 96, at 10.

108. See *id.* Thierer notes that “today’s grandparents will recall that when they were teenagers in the 1950s and 1960s, their parents worried about their hanging out at burger joints and roller rinks. And today’s parents will remember that in the 1970s and 1980s, their parents were concerned about their hanging around shopping malls and video arcades. Those places were the social networking sites of their eras. And so it continues with the networking sites that today’s youngsters enjoy: digital, interactive, websites.”

109. See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM & MARY L. REV. 741, 743 (1992).

of children's internet use are much different than the risks current parents faced as children. Parents may be just as prematurely compelled to explain material they perceive to be age-inappropriate to their child as a result of information gleaned from the internet as from schoolyard banter. Thus, many of these harms fit squarely within our current First Amendment jurisprudence regarding the regulation of controversial content for children, because they either involve material protected or unencompassed by the First Amendment, both of which the Supreme Court has addressed.¹¹⁰ There is, however, at least one harm resulting from children's internet use that does present a new risk.

B. The Unique Risk of Reputational Harm

Our children and teenagers' internet behavior is placing them at risk of harming their reputations in a way that cannot be analogized to risks in the non-digital world.¹¹¹ Unlike the harms discussed above—exposure to controversial information, contact with sexual predators, and cyberbullying—the internet creates, rather than exacerbates, the risk of reputational harm. Reputation can be defined as “a shared, or collective, perception about a person,” often constructed by piecing together fragments of information about that individual.¹¹² It “is one of our most cherished assets,” as Professor Daniel Solove states, “[and] a key dimension of our self [that] . . . affects the very core of our identity.”¹¹³ Reputation, in many ways, makes our life valuable to others and our accomplishments purposeful, which can affect our ability to create change, succeed in our endeavors, and discover happiness. For better or worse, our freedom to create our own identity, “depends in part upon how others in society judge us.”¹¹⁴

When information is posted about someone on the internet, it has near infinite distributional potential, both at present and long into the future.¹¹⁵

110. See *supra* Part I.B.2.

111. See Daniel J. Solove, *The Future of Reputation: Gossip, Reputation, and Privacy on the Internet* 37 (2007).

112. See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 707-08 (1986).

113. See SOLOVE *supra*, note 111, at 30-31. Professor Solove cites from the Bible, Shakespeare, presidents, and sociologists in asserting the importance of reputation to humans throughout history.

114. *Id.* at 31.

115. It is very difficult to remove information from the internet—affirmative steps must be taken to remove material in most cases. Further, even if an individual takes down his or her information, it is difficult, if not impossible, to know whether anyone else has taken your information and distributed it elsewhere. Frequently, not unlike Las Vegas antics, what is on the

The ease by which information can be posted on the internet can potentially present a “haphazard” version of people’s lives, including often “incomplete, out of context, misleading, or simply wrong,” fragments of someone’s life.¹¹⁶ Further, the scope of information available on the internet about an individual is relatively common knowledge. Employers,¹¹⁷ higher education admission committees,¹¹⁸ family, friends, and even complete strangers¹¹⁹ troll the internet in search of others’ personal information. And, they are finding it. With adults, it is much easier to take an “assumption of risk” approach, much more akin to a Millsian approach to autonomy.¹²⁰ After all, adults are generally free to do whatever they would like with their lives, so long as it is legal. But, this phenomenon is of particular concern with respect to children and teenagers, who, because of their youth and inexperience, often do not understand the consequences of their actions.¹²¹

Very few commentators have focused on the much more serious reputational harm—unique to the internet context—that a child could face by putting their information on the internet at such a young age.¹²² As Professor Daniel Solove notes, “[w]e’re heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search. We will be forced to live with a detailed record beginning with childhood that will stay with us for life wherever we go, searchable and accessible from anywhere in the world.”¹²³ A less conspicuous harm than the sexual harms and overexposure concerns many focus on, is allowing a child to

internet, stays on the internet, unless someone affirmatively does something about it. In fact, there are special websites dedicated to ensuring material stays on the internet forever. The Internet Archive makes it possible to archive sites forever on a program called The Wayback Machine. See Internet Archive, Frequently Asked Questions, available at www.internetarchive.org/about/faqs.php#The_Wayback_Machine (last visited April 6, 2008).

116. See Jennifer 8. Lee, *Trying to Elude the Google Grasp*, N.Y. Times, July 25, 2002.

117. See SOLOVE *supra*, note 111, at 38; see also Alan Finder, *For Some, Online Persona Undermines a Résumé*, N.Y. Times, June 11, 2006 (noting that Microsoft officials admit to doing informal background checks on prospective employees while other employers continuously investigate their own employees).

118. See Brian Leiter, *Top Law School Warns Students: Watch What You Post!*, Sept. 1, 2005, available at http://leiterlawschool.typepad.com/leiter/2005/09/top_law_school_.html.

119. Recall the infamous Washingtonienne scandal, in which a blogger, Ana Marie Cox, revealed the blog, which included the author’s rather graphic sexual exploits, of the infamous “Washingtonienne,” Jessica Cutler, altering Cutler’s reputation overnight. See SOLOVE *supra*, note 111, at 50-54.

120. See SOLOVE *supra*, note 111, at 196-97.

121. *Id.*

122. *Id.*

123. *Id.* at 17.

permanently¹²⁴ display all the stages of their pre-teen through adult development online, or even worse, foster the internet ossification of their seventeen-year-old self. Most people have their secrets, awkward years, childhood (even adulthood) indiscretions, and they will generally remain concealed from college admissions staff, potential employers, or even your future family. As noted above, in this new digital age, however, college admissions staff and potential employers are actively scouring the internet for the OSN profiles of their prospective students or employees.¹²⁵ Thus, many children, in revealing personal information at a consequences-be-damned stage of their life, despite the potential opportunities,¹²⁶ are running a serious risk of stunting adult development, because their first impressions to the world are out of their immediate control.¹²⁷

There are two issues involved in reputational harms: Harms imposed on individuals by others and harms related to self-exposure. Harms imposed on individuals would include such recent examples as posting defamatory information, photos, or videos about other individuals without their consent.¹²⁸ Self-exposure harms would include individuals posting information, photos, and videos about themselves on their own personal OSNs that may cause them harm in the future. The harms imposed on individuals by others analogize more closely to many civil and criminal law injuries that occur in the real world, like defamation, slander, intentional infliction of emotional distress, fraud, and trespass. On the other hand, there are very few civil and criminal injuries we impose on an individual for harms inflicted upon herself.¹²⁹ Even in the context of children, society,

124. See *supra* note 108.

125. See *supra* notes 120-124.

126. This author certainly recognizes the myriad benefits the internet provides children and teenagers—educational, emotional, social, and informational. The solutions presented in this article would not negatively impact the benefits gained from internet use.

127. It is very easy for individuals to transfer information from your personal control—for instance, a photo or web posting can easily be saved to another person's hard drive or personal website. Without technical sophistication, most individuals do not know how to protect their information from distribution.

128. See, e.g., Juli S. Charkes, *Cracking Down on the Cyberbully*, THE NEW YORK TIMES, March 30, 2008 (discussing Journal of Adolescent Health statistics on increasing number of online harassment victims, which includes as many as 9 percent to 34 percent of adolescent victims in a two-month period); Christopher Maag, *When Bullies Turned Faceless*, THE NEW YORK TIMES, December 16, 2007 (discussing cyberbullying by posting insulting messages on someone's OSN site).

129. There are laws prohibiting conduct that could harm individuals and laws that punish individuals for harming themselves; however, it is generally in the context of conduct that the state has criminalized. Examples include laws both prohibiting and punishing underage drinking, drunk driving, and underage smoking. See *supra* notes 19-20 (sale of cigarettes and alcohol to minors); see also D.C. CODE § 50-2201.05 (2001); IDAHO CODE ANN. § 18-8004. (drunk driving).

in many instances, imposes the duty upon another individual.¹³⁰ That said, our legal system, especially in the context of free speech and expression, does not easily impose restrictions on individuals for potentially harming herself by what she expresses.¹³¹

Children and teens are posting potentially harmful information at an alarming rate. An example of such information is the recent spat of teenagers posting videos of themselves fighting each other on YouTube.com and MySpace.com.¹³² Eight Florida teenagers, aged fourteen to eighteen, are currently being tried as adults, and could face life in prison, for an assault on another teen.¹³³ They fought the young girl in retaliation for comments she had posted on the internet and planned to post it on YouTube.com about them; however, a parent intercepted the video before they could do so.¹³⁴ CNN.com posted the video on April 11, 2008, in conjunction with an article about the occurrence, and it is very likely that this video has already made its way across the internet through other third-party websites.¹³⁵ Thus, regardless of what ultimately happens to these teens, it is very likely that this fight will be immortalized on the internet. Perhaps the most shocking thing to note about the attackers was their reactions to being caught—one of them asked when she could go to cheerleading practice and the other lamented, jokingly, that she probably would not be able to go to the beach for spring break.¹³⁶ Another more recent example involves a college student, age twenty, who, after being charged for drunk driving in a crash that seriously injured a woman, posted pictures of himself dressed as an inmate with the label “Jailbait” on his Facebook profile page.¹³⁷ The prosecutors discovered the picture and used it as evidence in his subsequent trial.

130. See *supra* notes 19-20 (duty imposed on vendors and adults for furnishing prohibited substance to minor).

131. See U.S. CONST. amend. I.

132. See *Suspects in Video Beating Could Get Life in Prison*, CNN.com, April 11, 2008, available at <http://www.cnn.com/2008/CRIME/04/10/girl.fights/index.html> (last visited, April 11, 2008).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. See *Unrepentant on Facebook? Expect Jail Time*, CNN.com, available at <http://www.cnn.com/2008/CRIME/07/18/facebook.evidence.ap/index.html>, July 18th, 2008 (last visited Aug. 11, 2008) (the article notes that many prosecutors are using such information to increase sentencing for convicted criminals, as well).

These teens are not uniquely cruel, they just have a skewed sense of reality and consequences.¹³⁸ In other words, they are just kids. As psychologist Susan Lipkins noted, “[t]here is a disconnect between their actions and their thoughts.”¹³⁹ In some ways, this psychology is part of the maturing process, and something that we, as a society, expect of teenagers and children; however, in the internet context, such cavalier, exhibitionistic behavior may have shocking consequences on these teenagers’ lives, in a way that is divorced from the present effect of the act. The cyberbullying example is somewhat anomalous, because it should be far easier for a teenager or child to comprehend the long-term consequences of illegal action, like assault. It is more challenging, however, to understand how posting seemingly innocuous content, like personal information, pictures, videos, and messages that do not implicate illegal conduct could also affect a minor’s adult life. As discussed above, though, employers and admissions committees are seeking out all information, more often based on an individual’s legal behavior. Even con artists are seeking children’s information online to falsify credit applications, often destroying a child’s credit unbeknownst to the child or parents until the child applies for a loan or credit cards, often for college tuition.¹⁴⁰ One can imagine how political views, religious views, choice of dress, preference in social activities, and just an offhand joke or comment could all affect a future employer’s perception of you. These elements of our identity evolve throughout our life, but by the time an individual enters the workforce, for many people, the evolution has stabilized. Unfortunately, we may not have control over what remains on the internet, and frequently, our internet identities are like Swiss cheese, with many holes throughout, lacking explanation and excuse.

As Professor Solove notes, there are several legal approaches to reputational harms, in which the harm is imposed on another individual: the libertarian approach, the authoritarian approach, and Solove’s middle-ground approach.¹⁴¹ The libertarian approach is cautious about restricting the free flow of information. Those that advocate this approach view the internet as the “wild west,” and believe the law should stay out.¹⁴²

138. See *supra* note 133. (As a 2006 Justice Department report found, this phenomenon is sadly not uncommon, by age seventeen, 21 percent of girls said they had assaulted someone with the intent to cause serious harm.)

139. *Id.*

140. See Brigitte Yuelle, *Stolen Innocence: Child Identity Theft*, Bankrate.com, available at <http://articles.moneycentral.msn.com/Banking/FinancialPrivacy/StolenInnocenceChildIdentityTheft.aspx>.

141. See SOLOVE, *supra*, note 111, at 110-116.

142. See Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L. J. 1207 (2002).

Although this approach zealously protects free speech, it fails to protect individuals' privacy rights. The authoritarian approach would control the spread of information by banning the flow of problematic information.¹⁴³ This approach is appealing, because it seems clear-cut; however, as history has shown us, standards defining what could be problematic information, not unlike standards defining obscenity, are far from black and white.¹⁴⁴ Thus, this approach would likely run up against First Amendment protections.¹⁴⁵ Solove offers a middle-ground approach in which the law would help shape norms appropriate to the realities of cyberspace.¹⁴⁶ He suggests that the law should act as a threat in the background, while in actuality, problems would be worked out informally.¹⁴⁷ These approaches, however, are better suited to addressing adults harming each other, than the harms of adult and child self-exposure, as Solove himself implies.

The idea of protecting individuals against their own speech and expression, frequently labeled paternalism, is not looked upon favorably.¹⁴⁸ As John Stuart Mill noted: "The only part of the conduct of anyone for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute."¹⁴⁹ In fact, in many ways, our country's founders predicated our government on the notion that the government cannot control individual's beliefs, even if different than the majority.¹⁵⁰ Thus, historically, restricting speech and expression as being harmful has required the clearest legal showing by the government, which limits the smallest amount of protected speech.¹⁵¹ That said, as noted above, in the context of children, these protections are slightly more flexible.¹⁵² Consider Mill's autonomy principle regarding children:

143. See SOLOVE, *supra*, note 111, at 112.

144. *Id.* at 113.

145. Consider, for example, a 1990s Georgia statute that banned sending data through a computer that falsely identified oneself, which was struck down by a federal district court under the First Amendment. See *ACLU v. Miller*, 997 F. Supp. 1228 (N.D. Ga. 1997).

146. See SOLOVE *supra*, note 111, at 124 (suggesting the law should create incentives for parties to use mediators and negotiators to resolve issues).

147. *Id.*

148. See SOLOVE *supra*, note 111, at 197 n.15.

149. See JOHN STUART MILL, *ON LIBERTY* 11 (Norton edition, David Spitz, ed. 1975).

150. See U.S. CONST., amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.")

151. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942).

152. See *supra* Part I.B.2.

It is perhaps hardly necessary to say that this doctrine [of autonomy] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.”¹⁵³

The reputational harms facing children are dramatic, far-reaching, and at present, precariously inconspicuous. At risk of being overly simplistic, there are two ways to view the current explosion of children posting their personal information online. The first view suggests it is entirely possible that the desire to indiscriminately post personal information is a “manifestation of generational differences.”¹⁵⁴ Perhaps the ease at which children and teenagers post personal information for the world to see is akin to evolving generational taboos such as females exposing more skin, men staying at home to raise children, and pre-marriage cohabitation.¹⁵⁵ This view cautions against overregulation, because individuals are educated about the risks and are not subject to the same injuries. If an individual is aware that whatever she posts on the internet is permanent and will be accessible to anyone at anytime in her life, she may actually desire such candor and openness with the world. In that case, the same risk of harm does not exist, because, she will rarely be surprised that the whole world knows about her life, thus, she is less likely to get injured from disclosure. The second view argues that that children and teenagers are simply ignorant about the breadth of the internet and the harms to which they are exposed. Legally, regardless of what the courts have concluded regarding children’s rights, there has always been an underlying notion that children and teenagers are not the same as adults.¹⁵⁶ This view counsels for

153. See MILL, *supra*, note 150.

154. See SOLOVE *supra*, note 111, at 197.

155. See Anita Allen, *Coercing Privacy*, 40 WM & MARY L. REV. 723, 737 (1999) (discussing the notion of evolving norms that “[o]ur parents may appear on the television shows of Oprah Winfrey or Jerry Springer to discuss incest, homosexuality, miscegenation, adultery, transvestitism, and cruelty in the family. Our adopted children may go on television to be reunited with their birth parents. Our law students may compete with their peers for a spot on the MTV program *The Real World*, and a chance to live with television cameras for months on end and be viewed by mass audiences.”).

156. See, e.g., *Bellotti v. Baird*, (while holding that children have the right to have an abortion without parental consent, the Court still reminded us that minors “are not beyond the protection of the Constitution” but that their constitutional rights “cannot be equated with those of adults,” because of three characteristics: their peculiar vulnerability, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child-rearing).

regulation to protect a generation of children from harms they will invariably face in the future as they advance through school, jobs, relationships, and life. Allowing children and teenagers to indiscriminately post personal information on the internet could have the affect of freezing their reputation prematurely, which will prevent them from developing their desired identities as adults. Ultimately, limiting children and teenagers' freedom now will give them more freedom in the long-run.

IV. Potential Solutions: Guarding Against Reputational Harms and Preserving Parental and Children's First Amendment Rights

Much of the harm children face on the internet does not differ from those harms that have always worried parents and the government. Protecting children from online predators can be easily analogized to the "don't take candy from strangers" cautionary tales of yore, just as cyberbullying to playground tussles and cafeteria gossip, and fears of overexposure to regulations on violent and sexual content in print magazines, film, and television. As the technology changes, in many cases, the underlying risks remain, if only masquerading in cyber-costumes. Thus, outside of the public school and child-harm contexts, parents should have the discretion to choose to what extent they want to expose their child to such risks. Nonetheless, there are new, unique to the internet risks, in which parents should perhaps have less control. One such risk, as discussed above, is the potential reputational harm children could face at later stages in their lives, as a result of posting copious amounts of information online.

I weigh two solutions that could effectively guard against the risks of reputational harm without trammeling too much on parents' or children's First Amendment rights to freely express themselves: education and regulation.

A. Education

Technology—in the form of fences around pools, pool alarms, and locks—can help protect children from drowning in swimming pools. However, teaching a child to swim—and when to avoid pools—is a far safer approach than relying on locks, fences, and alarms to prevent him or her from drowning. Does this mean that parents should not buy fences, alarms, or locks? Of course not, because they do provide some benefit. But parents cannot rely exclusively on those devices to keep their children safe from drowning, and most parents recognize that a child who knows how to swim is less likely to be harmed than one who does not.

Furthermore, teaching a child to swim and to exercise good judgment about bodies of water to avoid has applicability and relevance far beyond swimming pools—as any parent who takes a child to the beach can testify.¹⁵⁷

There is no substitute for education, as the above metaphor, presented by a panel of experts studying how best to protect our children online, demonstrates.¹⁵⁸ The more that individuals know, the better equipped they are to guard against the potential risks and to maximize the benefits available to them online. The societal push to regulate children's internet activity is partly explained by adults' lack of understanding about the new technology, which "ha[s] created a sort of 'moral panic.'"¹⁵⁹ Based on parental rights law, it should first be the parents' responsibility to educate themselves and in turn, teach their children about the risks and benefits of posting personal information online; however, the state should support parents in this increasingly more challenging endeavor.¹⁶⁰ A recent example of a successful government effort in this area has been the OnGuardOnline.gov website, which "provides practical tips from the federal government and the technology industry to help you be on guard against Internet fraud, secure your computer, and protect your personal information."¹⁶¹ The federal government could also support the education of parents by authorizing federal grants to support efforts to promote internet safety conducted by qualifying entities such as schools, nonprofit organizations, state and local governments, and businesses.¹⁶² States could require schools to include media literacy and online safety courses at every stage of education within the regular curriculum.¹⁶³

157. See Computer Science and Telecommunications Board, National Research Council, *Youth, Pornography, and the Internet* (Washington, D.C.: National Academy Press, 2002).

158. See Thierer *supra*, note 96, at 3.

159. See Wade Roush, *The Moral Panic Over Social-Networking Sites*, MIT Tech. R. (Aug. 7, 2006), available at www.technologyreview.com/read_article.aspx?id=17266&ch=infotech.

160. See Kosse *supra*, note 98; see also Thierer *supra*, note 96.

161. See <http://onguardonline.gov/index.html> (six federal agencies collaborated to create the website: the Federal Trade Commission, the Department of Commerce, the Securities and Exchange Commission, the U.S. Postal Inspection Service, the Office of Justice Programs, and the Department of Homeland Security).

162. See "Bean Introduces Legislation to Fight Child Predators and Combat Cyber-Crime," Office of Congresswoman Melissa Bean, Press Release, February 13, 2007, available at www.house.gov/apps/list/press/il08_bean/2132007_SAFER_NET_Act.html (introducing the "Safeguarding American's Families by Enhancing and Reorganizing New and Efficient Technologies Act of 2006").

163. See Elizabeth Thoman and Tessa Jolls, *Literacy for the 21st Century: An Overview & Orientation Guide to Media Literacy Education*, Center for Media Literacy (2005), available at www.medialit.org/reading_room/article540.html.

There are few constitutional issues that educational initiatives could viably generate. Certainly, some parents may not like the idea of their children learning about such harms, but as the public school jurisprudence discussed above indicates, parents have a limited role in curricular decisions. Further, if education regarding such reputational harms raised colorable religious claims, which give greater potency to parents in a conflict between parents and the state, it is very likely that schools would allow exemptions. As for children's First Amendment rights, it is difficult to imagine an argument that educating children about the internet intrudes upon their speech and expression freedoms. If anything, education actually fosters freedom by giving children a more informed understanding of how the internet could both inhibit and cultivate their speech. Education is necessary but not sufficient to resolve the potential reputation harms facing children on the internet. The benefits of education will be seen in the long-run, but in the interim, it is necessary to take action to ensure the current generation of juvenile posters is protected.

B. Regulations on Online Social Networks

Four different types of regulations on OSNs could reduce the danger of reputations harms without overly intruding on children's First Amendment freedoms: (1) temporal regulations on the information minors post on the internet, (2) architectural limitations imposed on online social networks to encourage privacy, (3) distribution and duplication limitations on the material that minors post on the internet, and (4) stringent regulations on the type of personal information a child can post.

As discussed above, the internet is largely controlled by the federal government, so these regulations would have to originate in the Congress.¹⁶⁴ Turning to the first regulation, Congress could mandate that information posted by a minor under the age of eighteen be inherently temporary, so that after a statutorily imposed duration, the information would self-delete. Such a regulation should have a waiver provision in which a parent could affirmatively permit the child to keep information on the internet by signing a waiver provided by the OSN. The major objective of this regulation would be to encourage minors to think about whether they want their information to remain online in the same manner, and in the event that they simply forget about what they have posted online, it would disappear, so it would not affect them in the future. Temporal limitations on minors' posted information do not intrude upon children's First Amendment right to post information, because they have the ability to re-post whenever they wish. But, given the harms described above, it does

164. See *supra* Part I.B.3.

permissibly require children to think about what they are posting each time they post it, such that the posted information will more accurately reflect their evolving and maturing views. Further, in line with *Ginsberg*, it does not intrude on parents' rights to allow their children to freely access the internet, because the regulation does not control parents' decisions in any manner.¹⁶⁵ If a parent does not want their child's information to be constantly deleted, the regulation provides a waiver provision, which will likewise encourage parents to consider the regulation's purpose and make an informed decision about whether they want to allow their child to post personal information online.

Second, Congress could require OSNs to alter their architecture to reshape people's behavior on the internet with respect to privacy protection.¹⁶⁶ OSNs can have the same power as physical architecture, such as buildings to "affect the way we live and interact with our peers . . . [by] encourage[ing] people to be more open, to communicate with each other more frequently."¹⁶⁷ Similarly, the design choices of OSNs, like what qualifies as the default choices, can dramatically affect individuals' behavior. For instance, the default privacy setting on most OSNs is completely public, such that anyone in the public can view one's profile.¹⁶⁸ Thus, a user must take affirmative steps to change the default settings, and most do not.¹⁶⁹ Simply requiring that OSNs default settings be set to private requires individuals to affirmatively think about whether they want to expose themselves to the world, and that step alone, may help protect many people. This regulation would not affect parents or children's First Amendment rights, because all the choices—private versus public—are still there, and there are no obstacles in the way of choosing to expose your information except conscious consideration of one's choice.

Third, Congress could require OSNs to protect minors' information, photos, and videos against archival functions, copying, saving, or distributing by complete prohibition or notification when any of those actions are taken on their information. Again, such a regulation would have a waiver provision allowing the parent to allow the information to be freely duplicated or distributed and waive the right to notification. This measure is more paternalistic in that it does not require affirmative steps from the user herself, rather the OSNs would be required to include protective mechanisms. So, the benefit of informed risk in understanding

165. See Part I.B.1.

166. See SOLOVE *supra*, note 111, at 200.

167. *Id.*

168. *Id.*

169. *Id.*

one's exposure to the world, as with the architectural and temporal regulations suggested above, is not present with this solution. But, individuals are protected without intruding on their right to post personal information. As with the temporal limitation, parents' rights are unaffected, because the choice still remains for them to allow their child to indiscriminately post information online in any way they want. Children's First Amendment rights are more affected in the notification scenario, because their parents are being notified when information has been distributed or copied, which could potentially chill their speech. There could, however, be limitations that allow the parents only to know when information has been distributed or copied without knowing the content of the information.

Finally, Congress could adopt more stringent measures aimed at parental notification, in which OSNs would be required to distribute the information about members under a certain age to the parents or guardians, if under a certain age. This last suggestion seems like it could raise more serious First Amendment issues in chilling speech, and this author suggests that informal measures, such as education, could be more effective at protecting children than statutory alienation. Another option along this vein would be a complete prohibition on posting material on the internet; however, this solution would be far too rigid and unnecessary.¹⁷⁰

C. The Constitution and Reputational Harms

Restrictions on children's use of the internet, whether directly or via OSNs, raise potential First Amendment considerations. As noted in the discussions *supra* in Part I.B.1 and I.B.2, the state's interest in protecting children in a way that could potentially interfere with parental rights can be loosely classified in two categories: Regulating conduct that posed a threat of harm to the child and regulating exposure to material potentially protected by the First Amendment. When it came to harm encompassed by the state's police powers—such as abuse,¹⁷¹ neglect,¹⁷² or even sub rosa concerns of truancy¹⁷³—courts frequently held in favor of the state. On the

170. Some state Attorneys General, like Connecticut Attorney General, Richard Blumenthal, have gone so far as suggesting a complete prohibition on OSN users under the age of sixteen or eighteen. Draconian solutions, such as Blumenthal's, raise many First Amendment issues, as noted in the above discussion and would not necessarily resolve the underlying issue. In an age where age verification is years away from being feasible, rigid solutions are far less practical than education or more focused regulations that do not intrude so far on our youngster's precious First Amendment freedoms. See Thierer *supra*, note 96, at 3, 25.

171. See *In the Interest of C.F.*, 708 N.W.2d 313.

172. See *In re P. Children*, 149 N.H. 129.

173. See *Prince*, 321 U.S. 158.

other hand, when states regulated the type of speech and expression to which a child could be exposed, whether as an active participant or bystander, the Supreme Court required a clearer showing that the harm outweighed First Amendment principles.¹⁷⁴ Many of the harms arising from children's internet use falls into one of these two broad categories, as discussed above. Either the harm falls so far outside the First Amendment—such as regulating children's access to obscenity and protecting children from sexual predators. Or it is comfortably encompassed by the First Amendment—such as broad restrictions on posting false information or distributing certain material to minors. Reputational harms, however, pose a *sui generis* risk that requires a more nuanced jurisprudential approach that is a balance between the deferential harm standard taken in cases like *Prince* and the rigid stance of *Turner*.

Given the necessity to speculate on the risks of reputational injury,¹⁷⁵ the *Turner* test would make it impossible for a regulation to pass muster, because the harm would appear far too abstract.¹⁷⁶ On the other hand, too deferential a standard in the internet context is precarious, because there is a slippery slope with respect to the First Amendment, and legislatures would perhaps begin drafting broad laws to encompass far too much conduct.¹⁷⁷ Further, although the risks of reputational harm are, indeed, serious, the deferential standard should be used sparingly in the context of more objective, clear-cut harm. Courts could view reputational harms as *sui generis*, and apply a modified *Turner* test, which allows a less-direct showing of harm, to allow regulations to protect children from reputational harms that do not unreasonably intrude on their First Amendment rights.

Ultimately, the temporal, distributional, and architectural limitations seem the most feasible when weighed against First Amendment values. As the above discussion demonstrates, there is a serious risk of reputational harm associated with children posting their personal information on the internet, although the precise harm, by necessity, can only be speculated upon. Based on the modified *Turner* test, all three limitations would, in fact, reduce the potential reputational harm, because there would either be less information on the internet about the children, or children will have an informed understanding of what is on the internet about them. Thus, the

174. See, e.g., *Turner*, 512 U.S. 622.

175. There is a speculative element to reputational harm, as we may not have an empirical understanding of the risks to which children are exposed with respect to reputational harm until this generation of child internet users have matured to their late-teens or early-twenties, as that is when the information available on the internet could potentially impact their lives (e.g., applying to institutions of higher education, jobs, relationships).

176. See *Turner*, 512 U.S. 622.

177. Note there is always the formidable check provided by judicial review.

risk of reputational damage will be ameliorated, because future employers, credit falsifiers, and admissions committees will not have the information, or the children will know about, and presumably have approved, any information such people do have.

V. Conclusion

Our current parental rights and First Amendment jurisprudence addresses most of the concerns that we have about children and teenager's internet use; however, reputational harm requires special, more nuanced standards. The risk that children's present internet activity could irreparably harm their reputations in the future is sufficiently weighty that the government should step in as *parens patriae* to combat it and protect our children's long-term freedom. To ensure our children and teenagers have the opportunity to develop their identities without the internet prematurely creating it for them, we must develop narrow regulations bolstered by education-based initiatives to protect the young from long-term consequences of their immature speech.

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