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### Adopting Social Media in Family and Adoption Law

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## ADOPTING SOCIAL MEDIA IN FAMILY AND ADOPTION LAW

Stacey Steinberg,<sup>\*</sup> Meredith Burgess,<sup>\*\*</sup> & Karla Herrera<sup>\*\*\*</sup>

*Social media has dramatically changed the landscape facing families brought together through adoption. Just as adoptive families thirty years ago could not have predicted the impact of DNA technology on post-adoption family life, adoptive families are only now beginning to grasp the impact of social media connectivity on the lives of their growing children. This change is related both to social media's impact on family life and to fundamental shifts in our understanding of privacy more generally. Understanding the legal rights of parents and children in these circumstances is a novel and underexplored area of family law, constitutional law, and privacy law.*

*Adoptions have traditionally been cloaked in confidentiality. Hearings that previously only took place in private courtrooms are now often broadcast on social media, giving a very public face to a traditionally private experience. This Article explores these changes and examines social media's impact on family life in the context of non-traditional families, including in that definition separated parents, foster parents, and families where parents live apart. These issues relate to how parents share about their children online and how such sharing impacts the children now and years into the future. Prospective adoptive parents and birth parents are uniquely situated to use social media to connect with*

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*each other and with their shared children. This Article offers a cogent path forward and provides model contractual language for attorneys and parents seeking to address these complex issues proactively. It also offers a potential legal remedy for children in the context of the right to be forgotten. Lastly, it encourages all adults engaged in non-traditional and adoptive families' lives to seek child-centered solutions that allow all family members the opportunity to thrive in our connected world.*

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#### INTRODUCTION

Nora, an abused and neglected eight-year-old, is removed from her parents' home and placed into foster care.<sup>1</sup> After a lengthy series of court proceedings, the state terminated the parental rights of Nora's parents. Nora's foster parents adopt her. While the court ordered her birth mother to have no further contact with Nora

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<sup>1</sup> The following story focuses on a hypothetical child based on a composite of real-life situations.

and her adoptive family, Nora's birth mother, Joy, joins a Facebook group<sup>2</sup> dedicated to others whose parental rights were legally terminated. Joy shares a photo album of Nora, including a caption with Joy's full name, location, and the circumstances of Nora's removal. The album is shared and liked by members of the group. The group's goal is that children will search for their birth parents independently using social media. The album exists as part of an informal database for birth parents' information and children's images. After some time, Nora searches for her birth mother on Facebook and discovers the album.<sup>3</sup>

Nora's adoption was handled by the Law Firm of Burg and Herr,<sup>4</sup> a boutique firm specializing in adoption and the formation of non-traditional families. The attorneys also work with Vanessa and Roy,<sup>5</sup> a couple hoping to become a family through adoption. After a contract with an adoption agency fell through, Vanessa and Roy paid for advertisements on social media platforms to spread their personal information and desire to adopt a child.<sup>6</sup> The advertisement includes Vanessa and Roy's first names, hobbies, personalities, and a photograph. A pregnant woman sees the advertisement and contacts Vanessa and Roy to set up the adoption of her child, Jake.<sup>7</sup> After months of contact, Vanessa and Roy are present at Jake's birth and take him home as they wait for the official adoption proceedings to progress. Jake's birth father, however, contacted Vanessa and Roy asking for custody of Jake. After a contested adoption process, Vanessa and Roy successfully adopted Jake but are fearful of posting about him on social media, worried that Jake's birth father will interfere with their lives.<sup>8</sup>

The Law Firm also represents families trying to adopt children overseas and connects prospective adoptive families with children like Sophia, a Chinese child available for adoption.<sup>9</sup> Burg and Herr place Sophia with American parents. But due to language barriers, the child's complete mental and physical status is not conveyed to the adoptive parents. The American family travels to China to bring home Sophia,

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<sup>2</sup> Examples of such Facebook groups include the Americas Taken group. Americas Taken, FACEBOOK, <https://www.facebook.com/AmericasTaken> [<https://perma.cc/7Q4Q-2TLY>] (last visited Aug. 21, 2022).

<sup>3</sup> Cf. Joseph Lee, *Adoption: 'Our Sons' Birth Family Turned Them Against Us*, BBC NEWS (May 12, 2021), <https://www.bbc.com/news/uk-57084243> [<https://perma.cc/RV3E-A8RD>] ("[Adoption UK's] research suggests nearly a quarter of adopted children make direct contact with their birth family[—]often via social media[—]before they gain the right to access information about their origins at the age of 18.").

<sup>4</sup> This is a fictitious firm.

<sup>5</sup> These are fictitious people.

<sup>6</sup> See generally Samantha M. Shapiro, *Adoption Moved to Facebook and a War Began*, WIRED (Mar. 4, 2021), <https://www.wired.com/story/adoption-moved-to-facebook-and-a-war-began/> [<https://perma.cc/93EX-QR8E>] (using the example of a real couple to demonstrate how frequently couples seeking to adopt pay to advertise their intentions).

<sup>7</sup> Hypothetical child based on a composite of real-life situations.

<sup>8</sup> E.g., Jennifer Gilmore, *The Dark, Sad Side of Domestic Adoption*, THE ATLANTIC (Apr. 30, 2013), <https://www.theatlantic.com/sexes/archive/2013/04/the-dark-sad-side-of-domestic-adoption/275370/> [<https://perma.cc/V39G-V7SL>].

<sup>9</sup> This is a hypothetical child based on a composite of real-life situations.

documenting the journey with photographs and videos, all shared via the family's social media account. The first months of Sophia's life with her new family in the United States are thoroughly documented and shared regularly. Over time, Sophia appears less frequently on the family's social media platforms until the adoptive parents ultimately reveal they elected to complete an informal transfer of custody of Sophia to another family due to undisclosed mental and physical conditions.<sup>10</sup> The adoptive parents do not discuss this plan with their attorneys, as the process has largely moved online. The family takes down their social media platforms, though copies of the videos and pictures with Sophia exist on other websites.<sup>11</sup>

The above vignettes demonstrate the many different roles social media can play in the adoption process. This new landscape creates unique challenges for attorneys like Burg and Herr, who became lawyers during a pre-social media era. The law has been slow to catch up with emerging technologies that can connect, support, harm, and separate adoptive families like the ones envisioned here. As such, attorneys need to understand the impact social media has made on adoption and family law. But there is a dearth of information currently available to assist them.<sup>12</sup>

Social media has dramatically changed many aspects of family life. These changes have had both positive and negative impacts on families.<sup>13</sup> For some

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<sup>10</sup> See N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVICES, N.Y. CHILD WELFARE AND COMMUNITY SERVICES, RE-HOMING: WHAT PARENTS NEED TO KNOW (2015), [https://ocfs.ny.gov/main/policies/external/OCFS\\_2015/INFs/15-OCFS-INF-01%20Re-homing%20of%20Children.pdf](https://ocfs.ny.gov/main/policies/external/OCFS_2015/INFs/15-OCFS-INF-01%20Re-homing%20of%20Children.pdf) [<https://perma.cc/YPR6-9BDQ>].

<sup>11</sup> Amanda Arnold, *Popular Mommy Vlogger Admits She 'Rehomed' Her Adopted Son*, THE CUT (June 3, 2020), <https://www.thecut.com/2020/06/youtuber-myka-stauffer-rehomed-her-adopted-son-huxley.html> [<https://perma.cc/K4PW-W7MR>] ("Over the past few months, fans of YouTube influencer Myka Stauffer started to suspect something was afoot with the popular mommy vlogger. For years, Myka's channels had included regular posts about Huxley, the 2-and-a-half-year-old child she and her husband adopted from China, in which she shared intimate details about his autism diagnosis[—]often in sponsored posts. But this past February, the toddler, now 4 years old, disappeared from her channel. On Mother's Day, Myka wrote that the holiday had been the 'hardest' she's ever had; in response, fans grew increasingly worried about Huxley's absence. Last week, in a vlog titled 'an update on our family,' a tearful Myka and her husband James revealed that they recently 'rehomed' Huxley out of concern for his well-being.").

<sup>12</sup> See Ann M. Haralambie, *Use of Social Media in Post-Adoption Search and Reunion*, 41 CAP. U. L. REV. 177, 180 (2013) (noting, with regard to the sealing of an adoption's legal records, that "[u]ltimately, Internet resources may make the remaining sealed records laws largely ineffective. This self-help through social media can be very effective, but there remain many social and legal questions about the privacy rights of all parties involved and whether such use exposes the searcher to legal liability").

<sup>13</sup> E.g., Evan Curran, *Video Chat Reduced Feelings of Isolation Among Grandparents During COVID-19 Pandemic, New Study Finds*, VAND. UNIV. (July 15, 2021, 9:05 AM), <https://news.vanderbilt.edu/2021/07/15/video-chat-reduced-feelings-of-isolation-among-grandparents-during-covid-19-pandemic-new-study-finds/> [<https://perma.cc/62NX-5ER5>] (finding that grandparents have increased their reliance on video chatting with their grandchild to maintain relationships and combat feelings of isolation).

parents, these changes have allowed their family to grow in a positive way, as prospective adoptive parents have used social media to find children in need of loving homes.<sup>14</sup> But alongside these positive developments, social media has also negatively impacted adoptive parents in significant ways.<sup>15</sup> Social media has created unexpected opportunities for birth families to maintain relationships with their natural children who were ultimately adopted by former strangers.<sup>16</sup> Such contact certainly impacts the children shared between the birth parents and the adoptive parents. These young voices, however, have often been missing from the narrative surrounding adoptive families.<sup>17</sup> Social media presents an opportunity for their inclusion.

Each family has a unique adoption journey. Several factors impact each family's process when adopting a child. This Article primarily focuses on domestic adoptions rather than the complex process of international adoptions. However, even domestic adoptions include several possible complications. For example, the family seeking to adopt must decide if they are willing to adopt through state foster care or through a private adoption agency. Importantly, public adoptions through the state do not involve as many fees charged to the person seeking to adopt,<sup>18</sup> while private adoption agencies are typically more expensive.<sup>19</sup> Additionally, as this Article discusses below, some families choose to forgo the foster care system or private adoption agencies and instead seek children out on social media.<sup>20</sup>

Many factors can still impact the new family, even after a successful adoption. The adopted child's age can impact the transition into a new family, especially regarding social media use. The older the child is, the more likely the changes to the

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<sup>14</sup> Lita Jordan, *How Do I Use Social Media for Adoption?*, ADOPTION.ORG GLADNEY CTR. FOR ADOPTION (Sept. 30, 2019), <https://adoption.org/use-social-media-adoption> [<https://perma.cc/8YPL-2ZCB>] (advising that “[social media] can even be a platform for you to match with a child for adoption,” but also noting that “[o]n the other hand, social media can provide some downfalls in the adoption process and open you up to both scams and criticism. It will be using social media to your advantage and knowing how to do so that will make all of the difference in your adoption process”).

<sup>15</sup> See Shapiro, *supra* note 6 (noting that the couple seeking to adopt did not “imagine they’d be filing a police report, or pleading with Facebook to delete posts that called them human traffickers. They didn’t expect the internet to be involved in the process at all”).

<sup>16</sup> Kaitlin A. Black, April M. Moyer & Abbie E. Goldberg, *From Face-to-Face to Facebook: The Role of Technology and Social Media in Adoptive Family Relationships with Birth Family Members*, 19 ADOPTION Q. 307, 307 (July 18, 2016) (“[M]any adoptive families are now connecting with birth family members with whom they have previously not had contact or, at the very least, possess more information about birth family members, given the ease of searching for them online.”).

<sup>17</sup> See American Bar Association Child Custody and Adoption Pro Bono Project, *Hearing Children’s Voice and Interest in Adoption and Guardianship Proceedings*, 41 FAM. L. Q. 365, 366 (2007).

<sup>18</sup> Kerry Daly & Michael Sobol, *Public and Private Adoption: A Comparison of Service and Accessibility*, 43 FAM. RELS. 86, 90 (1994).

<sup>19</sup> *Id.*

<sup>20</sup> For further discussion, see *infra* Part II.

family dynamic may impact the child.<sup>21</sup> This issue is compounded by another decision families must make: will the adoption be open or closed? In an open adoption, the birth family may maintain contact with the adoptee,<sup>22</sup> while a closed adoption is more likely to prohibit ongoing contact and may impact the adoptee's access to court records of the adoption.<sup>23</sup>

Few legal researchers have explored how social media has transformed adoption.<sup>24</sup> As such, this area of family law is largely underexplored, and it also implicates constitutional law and privacy law. To that end, Part I examines family law cases involving social media sharing and "sharenting," defined by Collins Dictionary as "the habitual use of social media to share news, images, etc[.] of one's children."<sup>25</sup> Next, Part II explores laws, policies, and best practices that set forth how prospective families should engage online, the impact of DNA testing on adoptive families, and potential remedies for children whose personal information has been shared online during the adoption process. Lastly, Part III proposes a cogent path forward that recognizes the need for families and social service organizations to rely on social media for connection and growth while simultaneously offering children meaningful solutions to the challenges they may face as they come of age with a digital footprint created during childhood's wake.<sup>26</sup>

Ultimately, this Article aims to help scholars, attorneys, child advocates, and policymakers better understand how social media has influenced family law, particularly with matters involving adoption. Used appropriately, social media can be a helpful tool for all parents, particularly those looking to adopt children. Yet these same platforms can also create unexpected harm to children as they get older and become aware of the digital trail left behind by well-meaning adults.

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<sup>21</sup> See Ellen Singer, *Adopting Older Children*, CTR. FOR ADOPTION SUPPORT AND EDUC. (2016), <https://adoption-support.org/wp-content/uploads/2016/01/Older-child-Adoption.pdf> [<https://perma.cc/KRC8-KVFL>] (noting that older adoptees' pre-adoption history and experiences may result in unresolved emotional issues).

<sup>22</sup> Emily Perez, *What Is the Difference Between an Open and Closed Adoption?*, ADOPTION.ORG GLADNEY CTR. FOR ADOPTION (Nov. 18, 2020), <https://adoption.org/what-is-the-difference-between-an-open-and-closed-adoption> [<https://perma.cc/SZ94-HMZH>].

<sup>23</sup> *Id.*

<sup>24</sup> See generally Frederic G. Reamer & Deborah H. Siegel, *Adoption Ethics in a Digital World: Challenges and Best Practices*, 24 ADOPTION Q. 69 (2021).

<sup>25</sup> *Sharenting*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/sharenting> [<https://perma.cc/HF9B-U6NT>].

<sup>26</sup> See also Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839 (2017).

## I. SOCIAL MEDIA'S IMPACT ON FAMILY LAW

To understand the role of social media in adoption law, one must first explore how social media has generally impacted family life.<sup>27</sup> To do that, one must consider privacy laws. While most privacy laws focus on conflicts between individuals and those living outside the family unit, few laws govern how individuals—particularly children—within a family unit can have privacy *separate and apart* from one another—particularly their parents.<sup>28</sup> This lack of privacy law governing family units is generally due to principles of family autonomy and the belief that parents will generally act in a manner that is in the best interests of their children.<sup>29</sup> To analyze these issues, this Part will proceed in six sections. First, it will explain how social media can create disputes within separated families, specifically in the context of parental sharing about children (sharenting.) Second, section B, will discuss whose story is being shared when separated parents choose to share online. Third, section C will discuss sharenting in the context of families brought together through foster care and adoption. Fourth, section D will discuss First Amendment implications associated with sharenting. Fifth, section E will discuss a child's need for normalcy in foster families. Lastly, section F will discuss how international communities navigate the complex issues social media often brings to the lives of non-traditional families.

### A. Sharenting, Separated Families, and Social Media Disputes

When parents separate, many matters relevant to child rearing are outlined in a parenting plan typically adopted by a family court.<sup>30</sup> These parenting plans give structure for children as parents now make decisions separate and apart from one another.<sup>31</sup> Traditional parenting plans before the rise of social media typically focused on ground-level decisions regarding the child, such as alternating weekend

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<sup>27</sup> See MAEVE DUGGAN, AMANDA LENHART, CLIFF LAMPE & NICOLE B. ELLISON, PARENTS AND SOCIAL MEDIA: MOTHERS ARE ESPECIALLY LIKELY TO GIVE AND RECEIVE SUPPORT ON SOCIAL MEDIA 2, 5 (2015), <https://www.pewresearch.org/internet/2015/07/16/parents-and-social-media/> [<https://perma.cc/6U5E-TWQF>] (“Three-quarters of online parents use Facebook.”).

<sup>28</sup> Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 762 (2011) (“We also note the different perceptions regarding the value and importance of privacy for adults in comparison to perceptions that undervalue children’s privacy.”).

<sup>29</sup> *Id.* (“Consideration of the right to privacy as operating between individual family members raises a tension between two perceptions of the family unit. The first is the individualistic approach, which considers the family to be a collection of individuals, each of whom has separate interests and rights. The second is the family-collectivist approach, which conceives of the family as a unit, having almost a separate legal personality.”).

<sup>30</sup> See Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 78–80 (2014) (discussing parenting plans, contracts for co-parents, and other legal documents governing families).

<sup>31</sup> *Id.*



visitation patterns.<sup>32</sup> Social media use is a novel addition to parenting plans, however; while parenting plans may address a child's access to technology, they rarely address how parents should share about their children online.<sup>33</sup>

"Sharenting" sits at the intersection of a parent's right to share and a child's interest in privacy.<sup>34</sup> Most research on the topic focuses on conflicts between parents and their children, not between parents themselves. There have been few, if any, reported cases in the United States in which a child has sued a parent for impermissible sharing about them online.<sup>35</sup> This is likely because children feel powerless to assert their rights within the family unit, especially when their rights are poorly defined, as they are in the context of online posts.<sup>36</sup>

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<sup>32</sup> See Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIM. L. 237, 238–41 (2005) (noting that this traditional visitation model fails to meet the "psychological" and "emotional well-being" of the children).

<sup>33</sup> See Stacey Steinberg & Kaytlin O'Sullivan, *Separating Parents and Social Media Helping Families Navigate Online Spaces Even When Parents Live Apart*, LONDON SCH. OF ECON. & POL. SCI. (May 20, 2020), <https://blogs.lse.ac.uk/parenting4digitalfuture/2020/05/20/separating-parents-and-social-media/> [<https://perma.cc/C94Y-ZKSJ>] ("In the United States, courts rarely limit a parent from speaking negatively about the other, even though such speech could potentially cause harm to children. For example, the Massachusetts Supreme Court recently held that an initial order restraining a father from speaking negatively about a mother on social media was unconstitutional. The court noted that while the state does have an interest in protecting children from parents talking negatively about one another online, 'merely reciting the interest' was insufficient to satisfy the 'heavy burden of justifying a prior restraint' on speech under the U.S.'s strong First Amendment protections. The court highlighted that parents could enter into voluntary agreements not to disparage one another on social media. Such an agreement would likely be upheld."); see also *Approved Parenting Plans*, STATE OF FLA. TWELFTH JUD. CIR., <https://www.jud12.flcourts.org/About/Divisions/Family/Pro-Se-Forms-Instructions/Parenting-Plans> [<https://perma.cc/XN99-Z7B6>] (last visited Aug. 23, 2022) (listing examples of possible parenting plans, although there are no references to social media sharing included in this sample plan, which is approved by courts in the 12th Judicial Circuit of Florida).

<sup>34</sup> See Steinberg, *supra* note 26, at 856.

<sup>35</sup> The cases we found all involve a parent seeking redress on behalf of a child, not the child seeking redress on their own. See, e.g., *Shak v. Shak*, 144 N.E.3d 274, 275–76 (Mass. 2020) ("At issue here are orders issued to the parties in this case in an attempt to protect the psychological well-being of the parties' minor child, given the demonstrated breakdown in the relationship between the mother and the father."); see also *Facebook, Inc. v. K.G.S.*, 294 So. 3d 122, 128 (Ala. 2019) ("K.G.S., individually and as the guardian and next friend of Baby Doe, filed an action in the trial court . . .").

<sup>36</sup> See Steinberg, *supra* note 26, at 868 ("Children have little to no recourse against parental oversharing for many reasons. First, children are expected to abide by the will of their parents. Second, children might lack opportunity to express their disdain or other feelings, such as embarrassment, humiliation, anger, or hurt. Finally, children might lack an understanding of the implications of their parents' online conduct. As stated above, in this uniquely original circumstance, society is only now ready to receive, analyze, and understand data from the great social media experiment.").

Children of separated or adoptive parents are uniquely situated to have their privacy protected online through other adults asserting the need for protection on their behalf.<sup>37</sup> These cases, explored below, offer a unique window into the conflicts sharenting can have in the lives of children in non-traditional family settings.

Separating and separated parents often disagree on the best way to raise children alongside social media.<sup>38</sup> Indeed, a growing body of research suggests that many parents struggle to balance protecting a child's privacy and sharing their stories online.<sup>39</sup> Much of the current research does not take into account that a large number of children have separated parents.<sup>40</sup> And given the contentious debate around social media in daily life, one may reasonably infer that separated parents often disagree about whether to post about their children online. There have been very few court decisions at the appellate level that address this issue, and we have been unable to find a source gathering them in one place.<sup>41</sup> Therefore, we have assembled these cases here, offering perhaps the first collated collection of cases exploring sharenting in the context of separated, adoptive, foster, and co-parents. We hope that this Part encourages new research and exploration of the issue of sharenting in the context of family law disputes.

*B. Whose Story Is It to Tell? Disagreements Between Co-Parents  
on What to Share*

Courts are reluctant to step in when parents disagree on what to share online.<sup>42</sup> In *Tinsley v. Tinsley*, a Louisiana appellate court affirmed a lower court's decision refusing to enjoin a father and his wife from posting embarrassing pictures of a minor child on their social media accounts.<sup>43</sup> In the prior divorce proceeding, each

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<sup>37</sup> See, e.g., *Shak*, 144 N.E.3d at 274.

<sup>38</sup> See *Co-Parenting and Social Media: Tips & Tricks*, KANTARAS L. BLOG (July 23, 2020), <https://www.kantaralaw.com/blog/2020/july/co-parenting-and-social-media-tips-tricks/> [<https://perma.cc/6YLN-U4V2>] (“For parents in a co-parenting arrangement, social media can be a significant stressor, especially if the parents disagree on how they should use social media.”).

<sup>39</sup> See *Thomas v. Cash*, 423 P.3d 670, 672 (Okla. Civ. App. 2016) (deciding that the lower court erred in granting a protective order against the biological family for posting pictures of the child on social media since the adoptive family voluntarily posted pictures of the child on social media); see also Steinberg, *supra* note 26.

<sup>40</sup> See Paul Hemez & Chanell Washington, *Percentage and Number of Children Living with Two Parents Has Dropped Since 1968*, U.S. CENSUS BUREAU (Apr. 12, 2021), <https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html> [<https://perma.cc/H93C-B7YG>] (explaining that only 70% of children lived in two parent homes in 2020). We use the phrase “separated parents” to describe those who may be engaged in a co-parent relationship; it is unclear who raises the children in separate households.

<sup>41</sup> See Haralambie, *supra* note 12, at 180.

<sup>42</sup> Steinberg, *supra* note 26, at 856.

<sup>43</sup> 211 So.3d 405, 420 (La. Ct. App. 2017).

parent sought joint custody of the minor child.<sup>44</sup> The court declined to enforce the mother's request for relief on several matters, including seeking an injunction to prohibit the father and his wife from posting embarrassing pictures of the minor child on social media.<sup>45</sup> The appellate court affirmed the lower court's decision, primarily concerned with the enforceability of the injunction at issue.<sup>46</sup> Indeed, the Court was reluctant to "interfere with a fit parent's constitutional right to parent and make decisions for their child as they see fit."<sup>47</sup>

In *Tinsley*, the father used Instagram to publicly punish his daughter for telling him a lie.<sup>48</sup> The mother was upset with his decision and requested an injunction to preclude the father from continuing to share. However, the court held that there was no "irreparable injury, loss, or damage that could result to the mother or the child by the post on Instagram."<sup>49</sup> While the court did not find that the father acted unlawfully, the court stated that the father's use of social media was clearly improper and inappropriate.<sup>50</sup> The court refused to enjoin the father from sharing, as he was within his right to make decisions for the child as he saw fit.<sup>51</sup>

Other courts have been reluctant to weigh in when parents disagree about how to share on social media. In *Harden v. Scarborough*, the Court of Appeals of Mississippi reversed a lower court's decision that restricted the biological parents from sharing pictures of the child on social media.<sup>52</sup> These parties were involved in a paternity dispute over their son.<sup>53</sup> In the lower court's custody order, the court prohibited the parents from posting pictures of the child on social media.<sup>54</sup> On appeal, the father asserted that the lower court erred in its judgment, holding that in the absence of evidence showing that the conduct was harmful to children,<sup>55</sup> the court cannot dictate what would normally be parental decisions about a child's health, education, and welfare.<sup>56</sup> Ultimately, since there was no evidence that the child was ever harmed or threatened with harm by his parents, the appellate court did not prohibit the father from sharing pictures of the child on social media.<sup>57</sup>

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<sup>44</sup> *Id.* at 408–09.

<sup>45</sup> *Id.* at 409.

<sup>46</sup> *Id.* at 420 (reasoning that the father's activity on social media did not cause any "irreparable injury, loss, or damage" to the child's wellbeing).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 418–419 (as a form of punishment the father made the daughter post a picture of herself on her Instagram page holding up a sign that said, "I WILL BE A LEADER, NOT A LIAR!!").

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 420.

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

<sup>52</sup> 240 So.3d 1246, 1257–58 (Miss. Ct. App. 2018).

<sup>53</sup> *Id.* at 1250.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1258; *see also In Re Adoption of K.B.D.*, 982 N.E.2d 872 (Ill. App. Ct. 2012) (reaffirming the lower court's decision to terminate the biological mother's parental rights due to the presence of online postings that were deemed disturbing).

<sup>56</sup> *Harden*, 240 So.3d at 1258.

<sup>57</sup> *Id.*

Similar cases have even made it to a state supreme court. Indeed, the Massachusetts Supreme Judicial Court examined similar issues in a divorce case, holding that courts cannot preclude parents from posting disparaging remarks about the child or co-parent absent a compelling interest.<sup>58</sup> In *Shak v. Shak*, a child's mother tried to stop the father from posting disparaging remarks about her and their daughter on social media.<sup>59</sup> While a lower court agreed with the mother and entered an order precluding the father from doing so in the future, a separate court (at the same level and in the same jurisdiction as the issuing court) was called upon to enforce the order. This court disagreed with the first order, holding it was an unconstitutional prior restraint on the father's freedom of expression.<sup>60</sup> While the lower court recognized that there may be some instances where a court can restrain a parent from posting certain disparaging remarks about the co-parent and child,<sup>61</sup> the court held that it could do so *only if* the order restraining speech is "narrowly tailored and supported by a compelling State interest."<sup>62</sup>

The Supreme Judicial Court ultimately agreed, holding that a prior restraint is permissible only where the harm expected from the unrestrained speech is grave, the likelihood of the harm occurring without the prior restraint in place is all but certain, and there are no alternative, less restrictive means to mitigate the harm.<sup>63</sup> The court emphasized that "[g]iven the 'serious threat to rights of free speech' presented by prior restraints," those "restraints cannot be upheld unless 'justified by a compelling State interest to protect against a serious threat of harm.'"<sup>64</sup> In the instant case, the mother could not meet this high burden since "[no] showing was made linking communications by either parent to any grave, imminent harm to the child."<sup>65</sup> The child was "too young to be able to either read or to access social media," and the risk of future discovery was too speculative.<sup>66</sup>

Courts are, however, willing to enforce contracts regarding sharenting and posting disparaging remarks about the co-parent online.<sup>67</sup> In *Nash v. Nash*, the court concluded that the lower court did not abuse its discretion when entering an order barring both parties from disparaging the other through social media.<sup>68</sup> In a divorce proceeding, the parents could not agree on child support.<sup>69</sup> While ruling on the issue

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<sup>58</sup> See *Shak v. Shak*, 144 N.E.3d 274, 279–80 (Mass. 2020).

<sup>59</sup> *Id.* at 276.

<sup>60</sup> *Id.* at 275–76.

<sup>61</sup> *Id.* at 276–77; see also *In re Evan J.*, 166 A.D.3d 430, 431 (N.Y. App. Div. 2018) (determining that the termination of the father's parental rights was appropriate given clear and convincing evidence of overall child neglect, including evidence that he posted threatening comments on social media directed at the foster mother).

<sup>62</sup> See *Shak*, 144 N.E. 3d at 276.

<sup>63</sup> *Id.* at 277–79.

<sup>64</sup> *Id.* at 279 (quoting *Care & Protection of Edith*, 659 N.E.2d 1174, 1176 (Mass. 1996)).

<sup>65</sup> *Id.* at 280.

<sup>66</sup> *Id.* at 280.

<sup>67</sup> See *Nash v. Nash*, 307 P.3d 40, 50 (Ariz. Ct. App. 2013).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 42.

of child support, the lower court agreed with a “parenting coordinator’s report that rebuked the mother for ‘tweeting’ a negative remark about the father and declared that she ‘must stop’ using social media to disparage [the father].”<sup>70</sup> Besides reviewing the lower court’s judgment on the award of child custody, the appellate court reviewed the issuance of the social media decree pertaining to the mother’s allegation that the decree violated her First Amendment right.<sup>71</sup>

On appeal, the court vacated the lower court’s judgment regarding the child custody judgment and affirmed the order prohibiting the parents from posting disparaging remarks about the other on social media.<sup>72</sup> The court noted that the presumption of invalidity that comes with prior restraint can be overcome if the restriction “serves a compelling governmental interest, is necessary to serve the asserted interest, is precisely tailored to serve that interest, and is the least restrictive means readily available for that purpose.”<sup>73</sup> A general concern for the child’s best interest will not allow a court to restrain free speech.<sup>74</sup> But in this case, however, both parties had entered into a joint custody agreement that imposed certain restrictions on their speech.<sup>75</sup> Moreover, the court emphasized that the mother’s post on social media might make its way to the children, especially if their parents are high-profile community members.<sup>76</sup> Therefore, the court concluded that the order was true to the intention and spirit of the parties’ agreement.<sup>77</sup>

These cases suggest that while courts are reluctant to enter orders restraining parental speech, they will indeed do so in two limited circumstances. First, courts will generally uphold prior restraints on speech if it is based on a negotiated agreement of the parties, as was seen in *Nash*, where both parents had agreed not to post certain information about their children online.<sup>78</sup> Second, as illustrated by *Shak*, courts will generally restrain parental speech if they find that the harm expected from the unrestrained speech is grave, the likelihood of the harm occurring without the prior restraint in place is all but certain, and there are no alternative, less restrictive

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<sup>70</sup> *Id.* at 42–43.

<sup>71</sup> *Id.* at 48.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 49 (alteration in original) (quoting *Hobbs v. County of Westchester*, 397 F.3d 133, 149 (2d Cir. 2005)).

<sup>74</sup> *Id.*; see also *Adoption of Ina*, No. 15-P-270, 2015 WL 7879866, at \*3, \*2 n.6 (Mass. App. Ct. Dec. 2, 2015) (affirming the termination of the father’s parental rights to protect the best interests of the child given that the father had, among other things, posted personal information about the child and their adoptive family on social media “in complete disregard of their confidentiality and security”).

<sup>75</sup> See *Nash*, 307 P.3d at 49.

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

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; see also *Scott v. Rhodes*, 188 A.D.3d 1075, 1076 (N.Y. App. Div. 2020) (affirming the lower court’s decision denying the biological mother’s petition to see the child since she “violated the terms of the post-adoption contact agreement”).

means to mitigate the harm.<sup>79</sup> These cases provide helpful illustrations of how courts will resolve social media disputes in the context of family controversy.

*C. Whose Child Is It Anyway? Foster Care, Adoption, and Social Media*

Social media's impacts on families and adoption become even more complex when children are in foster care because parental rights often remain in place even when children are placed outside of a parent's legal custody. In these circumstances, legal parents retain some rights regarding their children's health and educational affairs.<sup>80</sup> However, when the state has custody of children, other important rights revert to the state to control.<sup>81</sup> For example, legal parents do not retain rights to control their children's digital footprints, as the state regularly permits foster parents to post pictures of foster children online.<sup>82</sup>

Foster parent advocates would suggest that there are benefits to allowing foster parents to post pictures of their foster children online.<sup>83</sup> Allowing foster parents to share pictures of children in their homes promotes normalcy. Likewise, it helps promote the foster care process, exposing others to the beauty and the joys of fostering children. It would be challenging, and likely hurtful, for a family to exclude a foster child from a photo taken at a holiday gathering or on vacation. Yet foster parents are often temporary caregivers, while a digital footprint can last a lifetime.

In these dependency cases, courts terminate parental rights prior to a child being adopted by new caregivers.<sup>84</sup> During the interval between termination of parental rights and adoption, the child is legally considered in the state's custody.<sup>85</sup> Some children reside during this transitional time with prospective adoptive parents, while others live in temporary shelters.<sup>86</sup> In these dependency situations, the state often actively recruits prospective adoptive parents to consider adopting the dependent

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<sup>79</sup> See *Shak v. Shak*, 144 N.E.3d 274, 279–80 (Mass. 2020); see also *Harden v. Scarborough*, 240 So.3d 1246, 1257–58 (Miss. Ct. App. 2018).

<sup>80</sup> For example, only legal parents can consent to medical procedures and represent children in educational proceedings, even when the child has been removed for abuse and neglect. See, e.g., FLA. STAT. §§ 1014.01–1014.06.

<sup>81</sup> See, e.g., *id.*

<sup>82</sup> See CHILDS. BUREAU, U.S. DEP'T HEALTH AND HUM. SERV., SOCIAL MEDIA: TIPS FOR FOSTER PARENTS AND CAREGIVERS (July 2017), [https://www.childwelfare.gov/pubPDFs/smtips\\_parent.pdf](https://www.childwelfare.gov/pubPDFs/smtips_parent.pdf) [<https://perma.cc/4D7Y-SYXG>].

<sup>83</sup> See generally CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., SOCIAL MEDIA: TIPS FOR FOSTER PARENTS (2013), <https://www.ncsby.org/sites/default/files/resources/Social%20Media%20Safety%20Tips%20for%20Foster%20Parents%20--%20Child%20Welfare%20Info.%20Gateway.pdf> [<https://perma.cc/WD3P-743V>].

<sup>84</sup> See, e.g., FLA. STAT. § 39.806.

<sup>85</sup> See, e.g., *id.*

<sup>86</sup> See, e.g., *id.* § 39.402.

child.<sup>87</sup> The state regularly shares pictures of children available for adoption on social media in hopes of helping the children find adoptive families.<sup>88</sup>

The state would likely assert that posting pictures of children available for adoption helps these children find loving homes. And adoption advocates would likely (and correctly) suggest that precluding foster care agencies from making posts such as this would likely result in fewer children being adopted. Yet alongside these benefits come potential harms to the child. Once the child's picture is posted publicly, the child's dependent status is now a part of the child's digital footprint. These children, unable to consent to the posting of these pictures, may come to resent these disclosures of what is arguably confidential information.<sup>89</sup> Perhaps states should consider the impact of the digital information shared about children in their custody and seek ways to mitigate any harms that could come from the online disclosures.

#### *D. Sharenting and the First Amendment*

Biological parents retain some significant rights regarding posting about their children online, even when their children reside in foster care. In the *Interest of FG, AG PG*, the Supreme Court of Hawaii held that a lower court's entering of a temporary restraining order that prohibited the parents from disclosing the children's names to the public was not proper since the lower court failed to make findings that proved that the parent's conduct posed a serious and imminent threat to the best interest of the child.<sup>90</sup> In 2016, a family court awarded the Department of Human Services (DHS) family supervision based on a parent's substance abuse and the dangerous physical conditions of the parents' property.<sup>91</sup> The DHS placed the children in foster care, where one child tragically passed away.<sup>92</sup> The biological parents then posted details about the situation on social media.<sup>93</sup> The DHS moved to prevent the parents from disclosing confidential information regarding the children and the case.<sup>94</sup>

Subsequently, in a Facebook post, the mother revealed that the children were in the DHS's custody, that F.G. had died while in foster care, the names of the two surviving children, and the social worker's and foster parents' information.<sup>95</sup> The

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<sup>87</sup> See, e.g., *id.* § 63.082.

<sup>88</sup> See *A List of Photolists of Children Waiting for Adoption*, HEART GALLERY OF AM., INC., <https://www.heartgalleryofamerica.org/Galleries/Bookmarks.html> [<https://perma.cc/B69L-RSWM>] (last visited Aug. 19, 2022) (providing links to various state adoption agencies with photographs and descriptions of children available for adoption in that state).

<sup>89</sup> See, e.g., FLA. STAT. § 63.162 (explaining the strictly confidential nature of all adoption proceedings that occur in Florida).

<sup>90</sup> 421 P.3d 1267, 1275 (Haw. 2018).

<sup>91</sup> *Id.* at 1270.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

court then issued a temporary restraining order that prohibited the parents from disclosing confidential information.<sup>96</sup> The parents argued that this was an unlawful prior restraint on their First Amendment rights.<sup>97</sup> Ultimately, the lower court agreed with the parents and rescinded the temporary restraining order and entered a new order that prohibited the parents from disclosing only the records of the proceeding and the names of the other children.<sup>98</sup>

On appeal, the Supreme Court of Hawaii examined whether the family court properly applied the First Amendment analysis in issuing the temporary restraining order and whether the court abused its discretion in ordering the injunction.<sup>99</sup> The court found that the family court did not properly apply the First Amendment analysis and that the family court did not discharge its duty to find a “clear and present danger or a serious and imminent threat to a protected competing interest.”<sup>100</sup> Furthermore, the court found that the concerns raised by DHS were too speculative to support the issuance of the injunction.<sup>101</sup> Ultimately, the court vacated the family court’s order and remanded the case.<sup>102</sup> Like the decision in *Shak v. Shak*, this case illustrates the difficulties courts face in determining whether online disclosures truly harm the children at issue. These decisions will likely turn on very fact-specific analysis’ instead of blanket rules.

While the cases above focus on social media in pre-adoption proceedings, social media raises other concerns post-adoption. In *Facebook, Inc. v. K.G.S.*, for example, the Alabama Supreme Court analyzed the use of social media in a post-adoption matter but dismissed the suit due to lack of personal jurisdiction.<sup>103</sup> In that case, K.G.S. filed a petition to adopt Baby Doe.<sup>104</sup> The birth mother contacted Riben (a well-known critic of the adoption system) and shared her version of the events leading up to the adoption.<sup>105</sup> Riben, a contributor to the *Huffington Post*, published two online articles about the baby’s adoption, including the birth mother’s name and K.G.S.’s full name.<sup>106</sup> Among other things, the article stated that the birth mother had changed her mind about giving Baby Doe up for adoption.<sup>107</sup>

After the article’s publication, a third party created a Facebook page dedicated to reuniting Baby Doe and the birth mother.<sup>108</sup> The page included K.G.S.’s full name

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1271.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* at 1269.

<sup>100</sup> *Id.* at 1276.

<sup>101</sup> *Id.* at 1277.

<sup>102</sup> *Id.*

<sup>103</sup> *Facebook, Inc. v. K.G.S.*, 294 So.3d 122, 127 (Ala. 2019).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; *see also* *K.L.R. v. K.G.S.*, 264 So.3d 65, 89 (Ala. Civ. App. 2018) (finding that a protective order was injunctive relief in nature and therefore, the court did not have subject matter jurisdiction in the case).

<sup>108</sup> *Facebook, Inc. v. K.G.S.*, 294 So.3d 122, 127 (Ala. 2019).



and a number of baby pictures.<sup>109</sup> K.G.S. was inundated with malicious and persistent cyber-bullying.<sup>110</sup> K.G.S. requested deletion of the page, but Facebook refused.<sup>111</sup> Ultimately, the court held that it could not order Facebook to take the offending posts off social media.<sup>112</sup>

Courts are reluctant to interfere with how parents share online, whether they are foster parents, adoptive parents, birth parents, or co-parents. Absent a finding of significant harm to the child, these decisions will often be left to the parties to sort out without court interference, ultimately creating a system where individuals are free to share what they wish online.<sup>113</sup> These laissez faire social media decisions are consistent with First Amendment Free Speech protections but may disrupt the lives of those involved in foster care and adoption proceedings.

### *E. The Need for Normalcy for Foster Children*

Foster care and adoption have traditionally existed in a space cloaked with privacy. As a court system, foster care and adoption cases have almost exclusively been shielded from public access, serving as a protective barrier for children and parents. This shielding is accomplished through closed courtroom proceedings and limiting access to adoption filings.<sup>114</sup> But perhaps social media has informally encouraged these systems to operate in the public sphere since adoptions are often discussed (and often celebrated) online.<sup>115</sup> Similarly, though the identities of foster children and foster parents are traditionally kept confidential, many states have enacted laws, in the name of promoting normalcy for children in foster care, that allow foster parents to post pictures of foster children online.<sup>116</sup> This can alleviate awkward situations when foster parents post pictures of their legal children online but not their foster children. These laws place foster parents in control of day-to-day decision-making regarding how children use social media and how others view their family online.

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 127–28.

<sup>112</sup> *Id.* at 147.

<sup>113</sup> See generally *Adoption of Baby Boy W.*, 181 Cal. Rptr. 3d 130, 138 (Cal. Ct. App. 2014) (deciding a case wherein a biological father used an online site to start a petition in order to collect money with the purpose of preventing his child from being adopted).

<sup>114</sup> See, e.g., FLA. STAT. § 63.162.

<sup>115</sup> Chrissy Gochner, *Adoption Day: To Celebrate or Not: Maybe Not “Gotcha Day,”* ADOPTION.COM (July 23, 2021), <https://adoption.com/adoption-day-to-celebrate-not-some-flaws-in-gotcha/> [<https://perma.cc/DZS5-8S2H>].

<sup>116</sup> See Sherri Y. Simmons-Horton, *Providing Age-Appropriate Activities for Youth in Foster Care: Policy Implementation Process in Three States*, 82 CHILD. & YOUTH SERVS. REV. 383, 387 (2017); see also Jennifer Pokempner, Kacey Mordecai, Lourdes Rosado & Divya Subrahmanyam, *Promoting Normalcy for Children and Youth in Foster Care*, JUV. L. CTR. (May 2015), [https://jlc.org/sites/default/files/publication\\_pdfs/JLC-NormalcyGuide-2015FINAL.pdf](https://jlc.org/sites/default/files/publication_pdfs/JLC-NormalcyGuide-2015FINAL.pdf) [<https://perma.cc/YF76-G82A>].

For instance, Florida has a normalcy provision<sup>117</sup> in its Administrative Code that aims to “provide quality parenting, including approving or disapproving a child’s participation in activities based on the caregiver’s assessment using the ‘reasonable and prudent parent’ standard.”<sup>118</sup> This normalcy provision focuses on children’s “social development, recreation, academic growth and positive life experiences, based on a child’s desires and developmental, emotional, physical and other needs.”<sup>119</sup> In a publication from the Department and Children and Families of Florida, where the Code is explained, the publication emphasizes that children should be permitted to participate in social media, use computers, and have cell phones with the permission of their caregiver.<sup>120</sup> The publication states that the caregivers will need to apply the reasonable and prudent standard for decision making regarding social media.<sup>121</sup>

Other states have similar laws that protect the child’s livelihood.<sup>122</sup> Texas, for example, calls for an “age-appropriate normalcy activity” that “is generally accepted as suitable for a child’s age or level of maturity or that is determined to be developmentally appropriate for a child based on the development of cognitive,

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<sup>117</sup> See FLA. ADMIN. CODE r. 65C-28.019 (“(1) Caregiver decision-making. (a) Supervising agency approval is not required for decisions made by the out-of-home caregiver regarding a child’s participation in childhood activities. Childhood activities include attending or participating in: 1. Extracurricular clubs, 2. School and community sports, 3. Youth group activities, 4. Service organizations, 5. Birthday parties and sleep-overs, 6. Outings with peers, 7. Driver’s education, 8. Vacations with the out-of-home caregiver’s family or other families, 9. School or camp field trips; and, 10. Summer and school break camps. (b) Community-based care lead agencies shall provide training to all foster parents and contracted agencies to ensure normalcy for all children in care, pursuant to Sections 39.4091 and 409.145, F.S. (2) To ensure quality parenting, out-of-home caregivers shall: (a) Timely complete all required in-service training; (b) Mentor and coach birth parents, when available; (c) Facilitate visits between the child and his or her family, as required; (d) Refrain from making disparaging remarks to the child about his or her family; (e) Participate in school parent-teacher conferences; (f) Ensure the child attends all scheduled health care appointments, including medical and behavioral health; (g) Deliver age-appropriate life skills training to children ages 13 and older; (h) As part of progress updates, share information with the supervising agency and Department about the child’s progress, family’s progress, if known, and visitation; and, (i) Be supportive of transitions, including reunification, another adoptive placement, or any other changes in placement.”).

<sup>118</sup> See FLA. STAT. § 409.145.

<sup>119</sup> Memorandum from JoShonda Guerrier, Assistant Sec’y for Child Welfare & Vicki Abrams, Assistant Sec’y for Ops. on CFOP 170-11, Chapter 6: Normalcy; Chapter 7: Babysitting; Chapter 8: Vacation and Out of Town Travel through David L. Fairbanks, Deputy Sec’y of State of Fla. Dep’t of Child. and Fams., to Reg’l Managing Dirs. & Community-Based Care Lead Agency CEOs, at 6-5(d) (July 25, 2016), [http://www.qpiflorida.org/documents/normalcy/A16-004338\\_CFOP%20170-11%20Chapters%206%207%208.pdf](http://www.qpiflorida.org/documents/normalcy/A16-004338_CFOP%20170-11%20Chapters%206%207%208.pdf) [<https://perma.cc/3A79-XBBS>].

<sup>120</sup> *Id.* at 6-7.

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

<sup>122</sup> See generally Simmons-Horton, *supra* note 116, 387–90 (discussing child livelihood policies in California, Texas, and Florida).

emotional, physical, and behavioral capacities that are typical for the age or age group.”<sup>123</sup> Just like the Florida statute, this statute calls for a standard of care of a reasonable and prudent parent.<sup>124</sup> When using the reasonable and prudent standard, foster parents are encouraged to apply it to various childhood activities, including social media, cellphones, and email.<sup>125</sup> Although the Texas statute does not explicitly mention social media, it establishes a reasonable and prudent parent standard for foster parents in determining day-to-day activities that are age appropriate and meet the needs of the child.<sup>126</sup> This language suggests that courts should give foster parents deference in deciding what to share about children on social media. During the COVID-19 pandemic, many states have had to address their normalcy guidelines.<sup>127</sup>

The interests of the state, parents, and children often align in the context of social media sharing, but families impacted by adoption face unique challenges in this new sharing landscape. For example, the state generally gives great deference to foster parents to make normalcy decisions for the children placed in their care. And similarly, the state rarely interferes with birth parents sharing online about children, except in the most limited circumstances.<sup>128</sup>

#### *F. International Approaches to Children’s Privacy*

Despite the potential consequences to the child, U.S. courts often refrain from placing constraints on a parent to speak negatively about the other parent.<sup>129</sup> As illustrated previously in *Shak v. Shak*, the Massachusetts Supreme Judicial Court held such restrictions on the father’s speech would be an unconstitutional restraint on free speech.<sup>130</sup> There, the lower court’s non-disparagement order, later held unlawful, prohibited the father from posting negative remarks about the mother on

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<sup>123</sup> See TEX. FAM. CODE § 264.001(1)(A).

<sup>124</sup> See TEX. FAM. CODE § 264.001(5).

<sup>125</sup> See TEX. FOSTER CARE ASS’N, NORMALCY FOR CHILDREN AND YOUTH IN FOSTER CARE ROUNDTABLE REPORT 5–6 (2019), <https://securservercdn.net/166.62.112.107/y5l.82a.myftpupload.com/wp-content/uploads/2019/05/Normalcy-Report.pdf> [<https://perma.cc/D E7D-KJUD>].

<sup>126</sup> TEX. FAM. CODE § 264.001(5).

<sup>127</sup> See Mary Elizabeth Collins & Sarah Baldiga, *Normalcy for Children in Foster Care in the Time of Coronavirus*, 15 J. CHILDS. SERVS. 215, 215 (2020) (“COVID-19 has impacted normalcy in all lives, not just those of youth in foster care. But youth in care have heightened vulnerabilities and thus the impact of COVID-19 disruptions may be far more acute and long lasting. The many ways in which lives have been disrupted for youth in care include suspension of in-person family visits, broader use of technology for communications with social workers and families, closure of schools and consequent efforts to provide education through other mechanisms, confinement within the living setting (foster home or congregate care) due to stay-at-home mandates, and the inability to engage in the wide variety of activities in the community that make for a healthy life.” (citations omitted)).

<sup>128</sup> See *supra* Part I.B.

<sup>129</sup> See *id.*

<sup>130</sup> 144 N.E.3d 274, 279–80 (Mass. 2020).

social media.<sup>131</sup> The court reasoned that while the state has an interest in protecting children from parents' disparaging remarks about one another, the United States' long enshrined First Amendment protections required more than a "mere" recitation of that interest to allow a prior restraint.<sup>132</sup>

However, not all nations share the United States' robust speech protections.<sup>133</sup> Other countries may acknowledge a right to privacy as validating limitations on free speech.<sup>134</sup> Though free speech remains a fundamental principle across democratic societies, the dispute in *Shak v. Shak* could have ended differently if tried in outside the United States.<sup>135</sup>

These differences were illustrated in a recent Dutch judicial decision<sup>136</sup> applying Europe's General Data Protection Regulation.<sup>137</sup> In that case, a grandmother refused to take down photos of her grandchildren from social media.<sup>138</sup> The grandmother posted pictures of her three grandchildren (one of whom had lived with her for seven years) on Facebook and Pinterest without asking permission from her daughter.<sup>139</sup> The fourteen-year-old boy lived with her grandmother from 2012 to 2019, but the daughter regained custody of him and the other grandchildren.<sup>140</sup>

Applying the General Data Protection Regulation, the judge ordered the grandmother to delete all pictures of her grandchildren from Facebook and Pinterest within ten days.<sup>141</sup> The court explained that the General Data Protection Regulation states that individuals cannot post pictures of a minor under sixteen without the permission of the minor's legal guardian.<sup>142</sup>

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<sup>131</sup> *Id.* at 276–77.

<sup>132</sup> *Id.* at 279; see also Stacey Steinberg & Kaytlin O'Sullivan, *Separating Parents and Social Media: Helping Families Navigate Online Spaces Even When Parents Live Apart*, LONDON SCH. OF ECON. & POL. SCI. (May 20, 2020), <https://blogs.lse.ac.uk/parenting4digitalfuture/2020/05/20/separating-parents-and-social-media/> [https://perma.cc/3GBM-MHDD].

<sup>133</sup> Steinberg & O'Sullivan, *supra* note 132.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Rb. Gelderland 13 mei 2020, ECLI:NL:RBGEL:2020:2521 (Neth.).

<sup>137</sup> See generally *France Passes New Law to Protect Child Influencers*, BBC NEWS (Oct. 7, 2020), <https://www.bbc.com/news/world-europe-54447491> [https://perma.cc/FBQ2-WMKS] (describing a recent law passed in France that provides privacy protection to children online); see also Anurag Kundu (@AnuragKunduAK) TWITTER (May 3, 2021, 1:17 AM), <https://mobile.twitter.com/anuragkunduak/status/1389116830132752385> [https://perma.cc/7838-JVFB] (imploing all would-be adopters of Indian children to follow official legal protocols and not respond to advertisements on social media).

<sup>138</sup> See Adam Satariano & Claire Moses, *Grandmother's Refusal to Remove Photos from Facebook Tests Privacy Law*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/22/business/facebook-privacy-law-grandmother.html> [https://perma.cc/SNJ3-92FG].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

This decision drew significant attention from the general public. Neil Brown, a technology lawyer, stated that the ruling of the Dutch court “will surprise a lot of people who probably don’t think too much before they tweet or post photos.”<sup>143</sup> Controversies like the one at issue in the Netherlands had rarely made their way to U.S. courts due to the nature of interfamilial disputes. However, new privacy regulations and campaigns to raise awareness of the new laws may change that.

These cases offer a unique perspective on the importance of children’s privacy in social media sharing. While some of the protections apply to the European Union more generally, individual countries have also begun passing laws to protect children’s data specifically. For example, the United Kingdom’s Information Commissioner’s Office proposed new regulations protecting children’s data.<sup>144</sup> The goal of these regulations is to limit companies from “tracking the location of children [or] personali[z]ing content or advertising for them . . . .”<sup>145</sup> The law is more stringent in what it restricts than the European General Data Protection Regulation.<sup>146</sup>

## II. TODAY’S ADOPTION LANDSCAPE

Today, the paradigm of adoption has changed from a traditional legal process to what is now often an Internet-based process.<sup>147</sup> The Internet has had both a “transformative impact” on the adoption landscape and has raised numerous concerns about fraud, manipulation, and exploitation.<sup>148</sup> While the Internet has made such drastic changes to this traditionally *legal process*, adoption agency personnel struggle to prepare adoptive parents and children to be able to responsibly use the Internet.<sup>149</sup> Indeed, many argue that the Internet has turned adoption on its head.<sup>150</sup>

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<sup>143</sup> See Harry Howard, *Dutch Court Rules Grandmother Must Delete Photos of Her OWN Grandchildren After She Posted Them on Facebook Without Their Parents’ Permission*, DAILY MAIL (May 21, 2020, 9:46 PM), <https://www.dailymail.co.uk/news/article-8345625/Dutch-court-forces-grandmother-delete-Facebook-photos-grandchildren.html> [<https://perma.cc/JTD5-XB7W>].

<sup>144</sup> See Madhumita Murgia, *UK Targets Social Media and Gaming with New Children’s Code*, FIN. TIMES (Aug. 24, 2021), <https://www.ft.com/content/705e0468-bfcf-4f5d-b777-c25785d950cb> [<https://perma.cc/963Q-RD7R>].

<sup>145</sup> *Id.*

<sup>146</sup> *See id.*

<sup>147</sup> *See generally* AMY WHITESEL & JEANNE A. HOWARD, DONALDSON ADOPTION INSTITUTE, UNTANGLING THE WEB: A RESEARCH-BASED ROADMAP FOR REFORM (2013), <https://njarch.org/wp-content/uploads/2015/11/UntanglingtheWeb21.pdf> [<https://perma.cc/WJ66-JBK6>] (tracking adopted children for several years and examining the practices of Internet-based adoption providers).

<sup>148</sup> *Id.* at 11, *passim*.

<sup>149</sup> *Id.* at 68.

<sup>150</sup> *See* Michelle Healey, *Internet Has Turned Adoption on Its Head, Report Says*, USA TODAY (Dec. 12, 2013, 12:06 AM), <https://www.usatoday.com/story/news/nation/2013/12/12/internet-adoption-risks/3990871/> [<https://perma.cc/7NNR-L6JG>] (discussing “concerns about misleading promises, fraud and enticements for women to surrender their babies, as

This Part describes how new technology has impacted the adoption landscape. It includes a discussion of how social media has changed how hopeful adoptive parents search for their family, and a brief discussion of the existing laws and policies that protect children's privacy and how parents interact with them. This Part also includes a discussion of the disruption DNA testing kits have had in the overall adoption process.

### A. Finding Family Online

Social media and the Internet have revolutionized the adoption landscape.<sup>151</sup> Recently, scholarship has explored how adoptees, adoptive parents, birth parents, and adoption professionals interact with the Internet and social media.<sup>152</sup> One study, *Untangling the Web II*, asked various adoptees to opine about whether social media benefitted, harmed, or influenced their adoption.<sup>153</sup> Similarly, when studied, birth parents stated that the Internet and social media had had a profound impact on the post-adoption environment.<sup>154</sup>

Adoptive parents emphasized the importance of online communities where they can connect, share advice, and offer support.<sup>155</sup> At the same time, adoptive parents were aware of the risks of the Internet, including commercialization, threats to privacy, fraud, and potential coercion of birth mothers into giving their children up for adoption.<sup>156</sup> Interestingly, when studied, adoption professionals raised several concerns regarding Internet and social media use.<sup>157</sup> The exploitation of women and privacy were two of the most important concerns reported.<sup>158</sup> Indeed, only a few professionals stated receiving any sort of training on using the Internet.<sup>159</sup>

Adoption is inherently a sensitive topic that certainly permanently impacts the lives of all involved with the process.<sup>160</sup> Social media may act as a platform for such

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well as concerns about commercialization and the reach of for-profit adoption brokers who advertise and market aggressively” despite the numerous benefits the Internet provides for those seeking to adopt).

<sup>151</sup> See generally Michelle M. Hughes, *Internet Promises, Scares, and Surprises: New Realities of Adoption*, 41 CAP. U. L. REV. 279 (2013) (exploring both the benefits and harms of the Internet in the adoption landscape).

<sup>152</sup> See generally WHITESEL & HOWARD, *supra* note 147; see also Adam Pertman, Amy Whitesel & Jeanne Howard, *Untangling the Web*, MEDIUM (Dec. 19, 2013), <https://medium.com/@adampertman/untangling-the-web-3b3f8962022d> [<https://perma.cc/A9CZ-9PQX>] (summarizing the scope of the Donaldson Adoption Institute study).

<sup>153</sup> WHITESEL & HOWARD, *supra* note 147, at 27–28.

<sup>154</sup> *Id.* at 41, 63.

<sup>155</sup> *Id.* at 63.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 71.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See SORCHA NÍ CHOBHTHAIGH & FIONA DUFFY, *The Effectiveness of Psychological Interventions with Adoptive Parents on Adopted Children and Adolescents' Outcomes: A*

impacted individuals to share their experiences with adoption, and these experiences encompass a vast range of emotions, both positive and negative.<sup>161</sup> Additionally, online posts about adoption can be an invaluable method of connecting potential adoptive families to birth mothers.<sup>162</sup> However, those with negative experiences<sup>163</sup> of adoption can utilize social media platforms not only to share their stories but to possibly shame or “troll” other accounts posting about a desire to adopt.<sup>164</sup>

With the advent of social media in the adoption landscape, social media has become a place where regretful adoptees and birth mothers often impose their personal pain and anger upon prospective adoptive parents.<sup>165</sup> For example, one couple that was trying to adopt a child using the Internet and Facebook encountered Internet trolls who called them human traffickers and other disparaging names.<sup>166</sup> The couple filed a police report against the trolls and pleaded with Facebook to delete the posts.<sup>167</sup> They were unsuccessful in having the posts removed.<sup>168</sup> After the experience, the mother began joining in efforts for federal adoption reform.<sup>169</sup> In her advocacy efforts, she emphasized that “in a world where a child’s future may be mediated on various digital platforms with little accountability, one set of rules is needed.”<sup>170</sup>

Other couples have found social media to be a valued and integral part of their adoption journey and applaud its value. A couple from New York state decided to create an Instagram page detailing their daily lives as parents and as a family in the hopes that a pregnant stranger would pick them to become parents.<sup>171</sup> The hopeful parents used hashtags such as #adoptionrocks or #hopetoadopt under their Instagram posts.<sup>172</sup> Six weeks after creating the page, the mother received an email from a pregnant woman in Kansas, and after months of communication, the parties agreed

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*Systematic Review*, 24 CLINICAL CHILD PSYCH. AND PSYCHIATRY 69 (2019); see also Fabienne Hornfeck, Ina Bovenschen, Sabine Heene, Janin Zimmermann, Annabel Zwönitzer & Heinz Kindler, *Emotional and Behavior Problems in Adopted Children – The Role of Early Adversities and Adoptive Parents’ Regulation and Behavior*, 98 CHILD ABUSE & NEGLECT 1 (2019).

<sup>161</sup> For an example of Facebook groups intended to help users process the intense emotions associated with adoption, see *Americas Taken*, *supra* note 2.

<sup>162</sup> See Shapiro, *supra* note 6.

<sup>163</sup> See Haralambie, *supra* note 12, at 204 (describing the issues that arise with the use of social media in adoption, such as cyberstalking and bullying).

<sup>164</sup> See Shapiro, *supra* note 6.

<sup>165</sup> *Id.*

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

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Rachelle Bergstein, *We Used Instagram to Adopt Our Baby*, N.Y. POST (July 3, 2018, 4:58 PM), <https://nypost.com/2018/07/03/we-used-instagram-to-adopt-our-baby/> [<https://perma.cc/7424-GBWL>].

<sup>172</sup> *Id.*

to move forward with an adoption.<sup>173</sup> This New York couple's experience highlights how social media has helped couples create families through adoption.<sup>174</sup> The increasing role of the Internet in the adoption process allows for families to have greater access to resources and support, but social media also serves as a platform for those opposed to adoption to directly attack these same families seeking help.

### *B. Laws and Policies Protecting Children's Privacy*

Many children's privacy statutes generally assume that caregivers will protect a child's personal information from third-party actors, and indeed major statutes often place parents in the role of the gatekeeper, such as in the context of the Family Educational Rights and Privacy Act (FERPA),<sup>175</sup> the Health Insurance Portability and Accountability Act (HIPAA) regulations,<sup>176</sup> and the Children's Online Privacy Protection Rule (COPPA).<sup>177</sup> These federal laws rarely consider separated or foster parents. Also, despite the expectation that parents and guardians will act in a child's best interest, many adults in a child's life are unable to adequately protect their children's personal information for many reasons.<sup>178</sup> As time and technology advance, children become independent from their parents and—despite wide differences in family values—make their own personal decisions online.<sup>179</sup> Moreover, due to the growing complexities of privacy, artificial intelligence, and remedies when data is unlawfully disclosed, many adults—even the most well-informed—cannot fully appreciate the risks inherent in sharing personal information online.<sup>180</sup>

The COVID pandemic has amplified these risks, as more schools and community organizations rely on technology to keep families connected and share information.<sup>181</sup> While the immediate impact of such reliance seems positive,<sup>182</sup> the

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> 20 U.S.C. § 1232g(b)(1).

<sup>176</sup> 45 C.F.R. § 164.502(g)(3).

<sup>177</sup> 15 U.S.C. §§ 6501–6505.

<sup>178</sup> Steinberg, *supra* note 26, at 843.

<sup>179</sup> Jim Taylor, *Is Technology Creating a Family Divide?*, PSYCH. TODAY (Mar. 13, 2013), <https://www.psychologytoday.com/us/blog/the-power-prime/201303/is-technology-creating-family-divide> [<https://perma.cc/DG3C-UM9B>].

<sup>180</sup> See generally Cameron F. Kerry, *Protecting Privacy in an AI-Driven World*, BROOKINGS INST. (Feb. 10, 2020), <https://www.brookings.edu/research/protecting-privacy-in-an-ai-driven-world/> [<https://perma.cc/2PN8-H3MF>] (“As artificial intelligence evolves, it magnifies the ability to use personal information in ways that can intrude on privacy interests by raising analysis of personal information to new levels of power and speed.”).

<sup>181</sup> See Cathy Li & Farah Lalani, *The COVID-19 Pandemic Has Changed Education Forever. This Is How*, WORLD ECON. F. (Apr. 29, 2020), <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/> [<https://perma.cc/92MB-SZXH>] (exploring the impact the increased use of technology has had on education in connection to the health pandemic).

<sup>182</sup> *Id.*



long-term effect of putting so much personal information and communication online is unknown and perhaps unpredictable due to the growing speed with which such reliance is needed.<sup>183</sup>

This lack of governmental oversight, coupled with a caregiver's limited knowledge of how technology poses risks to children's privacy, leaves young children vulnerable in ways that will likely outlast their youth. For children in non-traditional families, these risks are exacerbated by unclear boundaries regarding who can share what, when information should be shared, and how.

*C. Social Media, DNA, and Adoption: A Recipe for Disaster or an Opportunity for Growth?*

DNA, like social media, has served as a “disrupter” in the adoption landscape, as DNA home testing kits allow adoptees to contact multiple providers to search for birth family members.<sup>184</sup> Genetic testing businesses, such as DNA Quest, actively seek to match individuals with previously unknown family members via genetic testing.<sup>185</sup> Although many adoptees utilize genetic testing services to seek out a birth family,<sup>186</sup> these services ignore the potential privacy violations caused to the birth family members.<sup>187</sup> These privacy interests are especially concerning due to the inconsistent regulation of the genetic material procured by companies like DNA Quest.<sup>188</sup>

Many DNA testing kits require no HIPAA-like verification processes and minimal privacy protections.<sup>189</sup> Because this at-home genetic testing process is becoming more commonplace, states are understandably concerned about the lack of regulations.<sup>190</sup> In response to the explosion of DNA services tracking birth family members, as of 2018, twenty-nine states now allow adoptees to access their birth records (though with some restrictions).<sup>191</sup>

When these two disrupters work in concert, they have an even greater impact on the adoption landscape. Some individuals even offer free services to reunite birth

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<sup>183</sup> See Manoush Zomorodi, *Do You Know How Much Private Information You Give Away Every Day?*, TIME (Mar. 29, 2017, 6:50 AM), <https://time.com/4673602/terms-service-privacy-security/> [<https://perma.cc/W2KK-8Y5H>] (describing how a majority of Americans care about their personal information and who receives it but still use these technologies because we do not think there are future consequences).

<sup>184</sup> See Marc McDermott, *Best DNA Test for Adoptees*, SMARTER HOBBY (Jan. 26, 2022), <https://www.smarterhobby.com/genealogy/best-dna-test-for-adoptees/> [<https://perma.cc/VNL7-QASX>] (offering a list of best DNA testing companies for adoptees).

<sup>185</sup> See Thomas May, *Sociogenetic Risks – Ancestry DNA Testing, Third-Party Identity, and Protection of Privacy*, 379 NEW ENG. J. MED. 410, 410 (2018).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 411.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 412.

<sup>191</sup> *Id.* (noting that Alabama allows birth parents to choose whether to allow contact).

families using social media and at-home DNA testing kits.<sup>192</sup> Christina Pearson is one such “Search Angel,” who aims to reunite families by researching genealogy to identify birth parents.<sup>193</sup> While conducting this research, Pearson stumbled upon the “DNA Detectives” Facebook group,<sup>194</sup> where people shared advice on how to use DNA testing to locate relatives. Pearson uses Ancestry.com and DNA kits as tools for genealogy research and offers the same services to others online as part of the “search angel” community.<sup>195</sup>

The idea of search angels began decades ago, partly due to how stigmatized adoption and unwed mothers were.<sup>196</sup> Groups would conduct genealogy research and push for access to sealed birth certificates to unite adoptees and birth families.<sup>197</sup> These early groups, such as the “Search Triad,” primarily provided practical advice on researching public records and offered moral support to adoptees.<sup>198</sup> Today, however, a combination of social media and consumer DNA test kits has led to a “triangulation” approach to finding birth families.<sup>199</sup> This approach begins by finding the closest possible relative using genetic testing and then building a family tree around that person.<sup>200</sup> The DNA Detective Facebook group (as of September 2021, this private group has 168,000 members) serves as a starting point for prospective “clients.”<sup>201</sup> Adoptees can search the page and find a willing “Search Angel” to help track down birth family members.<sup>202</sup>

There has been an additional shift where some search angels now charge for their time and effort. However, others, like Pearson, continue to work for free.<sup>203</sup> Pearson stated, “Adoptees have been discriminated against and forced to live under secrets and lies for decades. And then to have to pay in order to find the truth? That’s no good.”<sup>204</sup> Pearson also remains in contact with individuals for whom she has conducted searches.<sup>205</sup>

The use of DNA testing kits implicates many individuals’ privacy rights. For example, over the years, adoptees have grappled with privacy, on the one hand, and

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<sup>192</sup> See Oscar Schwartz, *DNA Search Angels: The Facebook ‘Detectives’ Who Help Reunite Families*, THE GUARDIAN (Apr. 29, 2019, 1:00 AM), <https://www.theguardian.com/lifeandstyle/2019/apr/29/dna-search-angels-adoption-facebook-detectives-reunite-families> [https://perma.cc/TS8A-XZKN].

<sup>193</sup> *Id.*

<sup>194</sup> See DNA Detectives, FACEBOOK (Feb. 28, 2015), <https://www.facebook.com/groups/DNADetectives/> [https://perma.cc/33KX-V3C8].

<sup>195</sup> Schwartz, *supra* note 192.

<sup>196</sup> *Id.*; see also Lisa A. Tucker, *From Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements*, 100 B.U. L. REV. 2317 (2020).

<sup>197</sup> Schwartz, *supra* note 192.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See DNA Detectives, *supra* note 194.

<sup>202</sup> Schwartz, *supra* note 192.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

with the utility of genetic information, on the other.<sup>206</sup> As explained above, many people use these services to be matched “to specific related people.”<sup>207</sup> One company launched a pro bono DNA testing service that would help adoptees find their birth relatives.<sup>208</sup> However, the use of DNA testing kits may threaten a person’s long-held identity. For example, one woman, “St. Clair,” received a DNA testing kit as part of a birthday gift.<sup>209</sup> While reviewing the results, St. Clair noticed that most of her family members were not present in her family tree. Initially, she thought the results were part of a technical glitch.<sup>210</sup> However, St. Clair began to question her identity upon learning that her DNA was not the same as her siblings.<sup>211</sup> St. Clair later turned to a Facebook group called DNA NPE Friends, where she found other people who were also struggling.<sup>212</sup> St. Clair’s experience is one of many that highlight the complex roles social media and DNA testing can play in the lives of adoptees and their family members.

Adoptees’ experience with DNA testing parallels an emerging right for children conceived via *in vitro* fertilization (through a surrogate or genetic donors) to know their genetic identity. As early as 1994, legal scholars contemplated the crucial role of knowing one’s genetic background.<sup>213</sup> In the United Kingdom, 2015 legislation legalizing third-party *in vitro* fertilization failed to account for the resulting child’s right to know his or her genetic background.<sup>214</sup> The United Nations Convention on the Rights of the Child acknowledges in Article 8 and Article 29 the importance of a child’s access to his or her identity and heritage.<sup>215</sup> Such information should

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<sup>206</sup> See May, *supra* note 185.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See Sarah Zhang, *When a DNA Test Shatters Your Identity*, THE ATLANTIC (July 17, 2018), <https://www.theatlantic.com/science/archive/2018/07/dna-test-misattributed-paternity/562928/> [<https://perma.cc/5RHC-RHMY>].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733 (1994) (explaining the legal and social issues surrounding egg donation). The connection to one’s genetic past, specifically through the biological parents but also concerning all “relatives linked by consanguinity,” is framed as a significant legal issue by the author. *Id.* at 734. This loss of genetic background applies to both adoptees and children conceived via “gamete donation.” *Id.* at 734–40. The author concludes that the law should “make certain that genetic information is not only available for every child so conceived, but also—as the child’s birthright—identifying information is provided.” *Id.* at 780.

<sup>214</sup> See Thana C. de Campos & Caterina Milo, *Mitochondrial Donations and the Right to Know and Trace One’s Genetic Origins: An Ethical and Legal Challenge*, 32 INT’L. J.L., POL. & FAM. 170 (2018).

<sup>215</sup> See G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [<https://perma.cc/TST9-NJ9R>].

include a genetic identity.<sup>216</sup> Like adoptees, individuals conceived by *in vitro* fertilization practices are organizing communities on social media platforms for support after discovering the truth behind their genetic background.<sup>217</sup>

The use of social media and DNA testing procedures has allowed the adoption community to grow and find each other. It has also created new questions about how adoptive parents, adoptees, and social workers should interact with these technological advancements. Perhaps these new questions should be looked at and answered through a new lens that reframes the importance of privacy for children. The next Part attempts to do just that.

### III. REDEFINING PRIVACY FOR CHILDREN IN FAMILY AND ADOPTION LAW

Redefining privacy for children in family and adoption law requires adults to constantly consider the impact that their disclosures could potentially have on the lives of their children both now and years into the future. It requires policy makers to consider how young people can take control of their digital footprint when they become old enough to understand the digital trail left in childhood's wake. Such privacy policies allow parents and other central adult figures in a child's life to make online decisions for a child, but it requires them to be both well-informed and forward thinking as they make choices on the child's behalf.<sup>218</sup> Prospective adoptive parents should be informed about the novel challenges that technology will play in their adoptive family. While birth parents and adopted children may embrace these changes, new technology and social media can cause significant disruption to family life and might not be met with enthusiasm by all parties. More research must be done to explore whether there are potential legal avenues or remedies available to help families negatively impacted by these technological advances.

#### A. *The Expanding Role of Open Adoptions*

Initially, a child's right to identity should be central to future regulations. As early as 2012, social workers began to realize the significance of social media and

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<sup>216</sup> See Judge Alexandra Harland, *Surrogacy, Identity, Parentage and Children's Rights – Through the Eyes of a Child*, 59 FAM. CT. REV. 121, 123 (2021) (noting that the United Nations Convention on the Rights of the Child emphasizes "the importance of recognizing a child's right to know the circumstances of their birth including genetic information"); see also *id.* (citing to research indicating the child's interests are best served when they are fully informed of the circumstances surrounding the conception and birth of the child and highlight the negative impacts of never disclosing such information to the child).

<sup>217</sup> See Sarah Zhang, *The Children of Sperm Donors Want to Change the Rules of Conception*, THE ATLANTIC (Oct. 15, 2021), <https://www.theatlantic.com/science/archive/2021/10/do-we-have-right-know-our-biological-parents/620405/> [<https://perma.cc/2M9N-A8NW>].

<sup>218</sup> See generally Steinberg, *supra* note 26.

its impact on open adoptions.<sup>219</sup> In a traditional setting, the adoptive parent serves as a “protective emotional safety net” by supervising contact with the birth family and helping the adoptee establish boundaries in communication.<sup>220</sup> It has often been considered natural for adoptees to feel curious about their birth families; now, social media platforms provide these children with the tools to connect independently, regardless of their adoptive parent’s wishes.<sup>221</sup> Social workers developed strategies for confronting these new challenges, and lawmakers would do well to consider them.<sup>222</sup> Best practices include encouraging adoptive parents to strongly consider being transparent with their adoptee about the adoption story and maintaining an open line of communication with the child regarding social media habits.<sup>223</sup> These habits are especially crucial today as the number of open adoptions increases.<sup>224</sup>

The international community also recognizes open adoptions<sup>225</sup> as likely being in the child’s best interest and fostering the child’s identity.<sup>226</sup> Roshan and Ghanizade Bafghi, two prominent scholars, encourage other scholars in social science fields to engage in further research to guide families in considering whether closed adoptions can still serve adoptive parents and children in light of our growing connectivity.<sup>227</sup>

Additionally, private adoption contracts could be a helpful tool for adoptive parents seeking legal remedies post-adoption. However, the presence of a private contract containing prior restraints can present hindrances in post-adoption legal proceedings.<sup>228</sup> In the court’s discussion in *Nash*, prior restraints come “with a heavy

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<sup>219</sup> See Deborah H. Seigel, *Social Media and the Post-Adoption Experience*, SOC. WORK TODAY (Oct. 2012), <https://www.socialworktoday.com/archive/091712p22.shtml> [<https://perma.cc/4EE7-AANS>].

<sup>220</sup> See *id.*

<sup>221</sup> See *id.*

<sup>222</sup> See *id.*

<sup>223</sup> See *id.*

<sup>224</sup> See Tucker, *supra* note 196, at 2324 (reporting that “[t]oday, almost 100% of birth mothers relinquishing newborns choose open adoption. Most birth and adoptive parents now meet in person, and the birth parents pick the new family for their baby. In addition, 67% of private adoptions today include Post Adoption Contact Agreements”).

<sup>225</sup> For an explanation of the difference between open and closed adoption, see Emily Perez, *What Is the Difference Between an Open and Closed Adoption?*, ADOPTION.ORG GLADNEY CTR. FOR ADOPTION (Nov. 18, 2020), <https://adoption.org/what-is-the-difference-between-an-open-and-closed-adoption> [<https://perma.cc/9CHU-5GQM>]. As Perez explains, in an open adoption, biological parents participate in the process of placing the child with the adoptive family and are allowed to have contact afterward. With a closed adoption, all records and information are closed and sealed by the court or agency. See *id.*

<sup>226</sup> *Id.*

<sup>227</sup> See M. Roshan & M. Ghanizade Bafghi, *Open Adoption and the Right to Identity in the Context of the Best Interest of the Child: An Analysis of Article 22 of the Act on “Protection of Children and Adolescents Without Guardian and with Inappropriate Guardian”* (2013), 13 J. FAM. RSCH. 497, 498 (2018).

<sup>228</sup> See *supra* Part I (outlining cases dealing with prior restraints and highlighting the importance of pre-adoption contracts to avoiding such issues).

presumption against constitutional validity.”<sup>229</sup> Adopting individuals must balance the benefits of a complete adoption contract with its potential restraint on speech.

If the speech restriction serves a compelling government interest, is necessary to serve the interest, is tailored to serve that interest, and is presented in the least restrictive means, then the presumption of invalidity can be overcome.<sup>230</sup> As demonstrated in the cases explained throughout this Article, courts like the one in *Nash* will uphold certain negotiated agreements to limit social media posts about the child.<sup>231</sup> A post-adoption contract may be seen as such a prior restraint negotiated between the parties in a prior matter. For example, in “From Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements,” Professor Tucker explores the benefits of post-adoption contact agreements relating to the benefit of all parties involved.<sup>232</sup> Tucker conceded that these agreements are rarely “functionally enforceable” but that there is value in the explicit assurances given by all the parties involved.<sup>233</sup> As such, Tucker proposes a shift away from viewing the post-adoption contact agreements as contracts and instead viewing the agreement as recognizing some sort of contact rights for the parties involved.<sup>234</sup> Though the parameters of post-adoption contact agreements<sup>235</sup> vary by state, we are unaware of any models that contemplate social media’s impact on open adoption. Researchers opine that open adoptions alter the connotations of shame and avoidance historically associated with adoption.<sup>236</sup> This change represents an acknowledgment “that adoption creates an adoptive kinship network, in which the child connects [with] his or her extended families of birth and rearing.”<sup>237</sup> Though open adoptions are fast approaching the default state,<sup>238</sup> the enforceability of open adoption agreements remains largely at the discretion of the adoptive parents.<sup>239</sup> In only about half of all states, a post-adoption contact agreement is enforceable should the adoptive parents decline to maintain an open adoption.<sup>240</sup> Unlike visitation agreements in divorce proceedings, adoptive parents in some states can elect to

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<sup>229</sup> See *Nash v. Nash*, 307 P.3d 40, 48–49 (Ariz. Ct. App. 2013).

<sup>230</sup> See, e.g., *id.* at 49.

<sup>231</sup> See, e.g., *id.* at 50.

<sup>232</sup> See generally Tucker, *supra* note 196.

<sup>233</sup> *Id.* at 2341.

<sup>234</sup> *Id.* at 2361.

<sup>235</sup> See, e.g., Robert D. Tuke, *Post-adoption Contact Agreements (Form)*, in 15 TENN. PRAC., LEGAL FORMS FAM. LAW & EST. PLAN. § 4:24.50, Westlaw TNPRAC-LF FAMESTP § 4:24.50 (last updated July 2022).

<sup>236</sup> Tucker, *supra* note 196, at 2334.

<sup>237</sup> *Id.* at 2323 (quoting Harold D. Grotevant, Gretchen Miller Wrobel, Lisa Fiorenzo, Albert Y.H. Lo & Ruth G. McRoy, *Trajectories of Birth Family Contact in Domestic Adoptions*, 33 J. FAM. PSYCH. 54, 54 (2019) (internal citations omitted)).

<sup>238</sup> *Id.* at 2349.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 2321.

terminate all contact between the adoptee and the birth family.<sup>241</sup> In circumstances like those, social media can be extra contentious.

Open adoption laws are expanding,<sup>242</sup> but adoptive parents' wishes usually govern enforceability. Indeed, most courts decline to enforce post-adoption contact agreements and instead choose to defer to the adoptive parents' wishes for the openness of the adoption.<sup>243</sup> State statutes also regulate open adoption agreements, often by limiting who can be a party to a post-adoption contact agreement.<sup>244</sup> Ultimately, courts look to the child's best interests in determining the frequency of contact for an open adoption arrangement.<sup>245</sup>

However, there are concerns about prioritizing the adoptive parents' wishes in an open adoption, especially if there is a conflict with the wishes of the birth parents or the adoptee.<sup>246</sup>

### *B. Valuing Children's Relationships*

Children have important relationships outside of the parent-child dynamic. These relationships are rarely protected by law, often at great cost to children. For example, in many states, siblings do not have standing to challenge the adoption of each other, even if this means that all contact between the siblings might cease.<sup>247</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> See Michael Jennings & William Vetterick, *Enforceable Post-Adoption Contact Agreements Come to Tennessee*, TENN. BAR ASS'N L. BLOG (Apr. 23, 2019), <https://www.tba.org/index.cfm?pg=LawBlog&blAction=showEntry&blogEntry=34286> [<https://perma.cc/B5PU-W7E5>].

<sup>243</sup> See Tucker, *supra* note 196, at 2350. See generally *In re Adoption of Edgar*, 853 N.E.2d 1068 (Mass. App. Ct. 2006) (deferring to the adoptive parent's wishes in enforcing a post adoption contract agreement); *Quets v. Needham*, 682 S.E.2d 214 (N.C. Ct. App. 2009) (same).

<sup>244</sup> See CHILDS. BUREAU, U.S. DEP'T HEALTH AND HUM. SERV., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 1, 2 (Aug. 2018), <https://www.childwelfare.gov/pubPDFs/cooperative.pdf> [<https://perma.cc/32NG-GS9Z>] (stating that Utah and Vermont limit agreements to children adopted from foster care; Wisconsin limits such agreement to stepparents and relatives; in Indiana, agreements are not enforceable until the child is two-years-old or older, and if under two, non-enforceable agreements cannot include visitation; and in Oklahoma, birth relatives can visit only if the child had previously resided with that relative).

<sup>245</sup> *Id.*

<sup>246</sup> Tucker, *supra* note 196, at 2321.

<sup>247</sup> See Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 5–6 (2011) ("Courts and child protection agencies grapple with these difficult questions and uneasy balances every day. Yet, with some notable exceptions, the balance, though difficult, tips in favor of 'permanency' over the preservation of familial bonds, and toward the rights of adoptive parents to raise their newly adopted children over the interests of siblings to continue their relationships with one another. Lost in the struggle is the sister or brother who

Until recently, foster parents rarely had legal standing to object to a change of placement for foster children, even if the children had resided in their home for a prolonged period.<sup>248</sup> Further, in *Troxel v. Granville*, the Supreme Court clearly established that, in almost all circumstances, grandparents do not have a legal right to visitation with their minor children and gives almost unfettered deference to parents to make decisions they deem are in the best interest of the children.<sup>249</sup>

These legal principles seem to rest on the idea that parents—including those acting in loco parentis (such as in the cases involving children in foster care) will act in a child's best interest. However, some argue that the best interest of the child standard<sup>250</sup> fails to comprehensively consider the child's point of view in decision-making, often to the detriment of the children.<sup>251</sup> In their article, *The New Law of the Child*, Dean Laura Rosenbury and Professor Anne Dailey argue for an expansion of the legal understanding of children's rights beyond the scope of dependency and autonomy.<sup>252</sup> Ideally, these rights would go “beyond acknowledging relationships of authority to encompass children's nonhierarchical relationships with siblings, other children, and nonparental adults.”<sup>253</sup> While maintaining the significance of the child-parent relationship, *The New Law of the Child* emphasizes the role of other types of

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‘looked out’ for his or her younger siblings when no one else did, and the ability for this important relationship to continue. Judges, children's lawyers, and child protection social workers are at a loss because they are unable to do anything to protect the sibling relationship, even when it is clearly significant. At the core of the problem is the ‘question of how to reconcile strong reservations against state intervention into family decision-making with a desire to protect relationships that might be important for the child.’” (quoting Annette R. Appell, *Court-Ordered Third-Party Visitation and Family Autonomy*, 3 ADOPTION Q. 93, 96–97 (2000))).

<sup>248</sup> See, e.g., Press Release, The Fla. Senate, Key Child Welfare Legislation Signed into Law (June 30, 2021), <https://flsenate.gov/Media/PressRelease/Show/3991> [<https://perma.cc/XQU9-AKMG>] (explaining that foster parents in Florida are now able to object to a change in adoption placement in limited circumstances); see also Eve Lumsden, *The Loophole in the Florida Notice Requirement for Foster Caregivers*, 8 CHILD & FAM. L.J. 165 (2020).

<sup>249</sup> See 530 U.S. 57, 68 (2000) (“Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.” (citations omitted)).

<sup>250</sup> See Erin Dougherty Lynch & Dan Lewerenz, *Brackeen v. Haaland – Indian Child Welfare Act*, NATIVE AM. RTS. FUND (Apr. 23, 2022), <https://www.narf.org/cases/brackeen-v-bernhardt/> [<https://perma.cc/PKB2-RLKL>] (indicating that the United States Supreme Court will hear a case involving the constitutionality of the Indian Child Welfare Act and asserting that the Act is in “the best interests of Native children[] [i]n keeping them connected to their extended family and cultural identity . . .”).

<sup>251</sup> See Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018).

<sup>252</sup> *Id.* at 1475.

<sup>253</sup> *Id.* at 1452.



relationships in a child's life.<sup>254</sup> By acknowledging the value in relationships beyond the parent-child dynamic, courts could more accurately carry out the best interests of the child in including these parties in post-adoption contact agreements.<sup>255</sup>

*C. The Use of Contracts to Govern Post-Adoption Social Media Contact*

Translating these principles into the context of adoption law is a new—and perhaps daunting—task. In many instances, adoptive parents may have a concern in the outcome of decision-making related to online sharing about their wishes for children, about children they have adopted, and about post-adoption contact between their adoptive child and the child's biological parents. In practice, few post-adoption contact agreements seriously consider the implications of social media in an open adoption.<sup>256</sup> However, some practitioners recommend using contracts as a catalyst to discuss boundaries in the context of social media,<sup>257</sup> namely by having the families clarify what is and is not appropriate online behavior regarding sharing information about the child.<sup>258</sup>

Post-adoption contact agreements moving forward can easily include language addressing the new challenges and opportunities presented by social media. In addition to a traditional form,<sup>259</sup> parties to a post-adoption contact agreement may implement the following provisions to facilitate an open adoption or to restrict contact between the adoptee and the birth family via social media. Provisions for an open adoption in the age of social media may include:

- “The birth family is permitted to view significant milestones in the child's life on social media platforms.”<sup>260</sup>

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<sup>254</sup> *Id.* (attempting to “identify a broader set of actors who should carry legally recognized and shared responsibilities toward children, including state actors and adults outside the family . . . related to caregiving and protection, education, rehabilitation, and fostering of civic engagement”).

<sup>255</sup> *Id.* at 1497.

<sup>256</sup> A 2018 Children's Bureau resource for open adoptions mentions social media once, and only as a way for adoptive and birth families to exchange “information” about the child. *See* CHILDS. BUREAU, *supra* note 244.

<sup>257</sup> *See, e.g.*, 12A N.Y. FORMS LEGAL & BUS. § 28A:45.50, Westlaw NY LF § 28A:45.50 (last updated Aug. 2022) (depicting a contract between the adoptive family and biological family in which the adoptive family agrees to post pictures of the child on social media for the biological family to see while the biological family is prohibited from posting pictures of the child on social media).

<sup>258</sup> *See* Marla Ruth Allisan, *Foundation for Love: General Principles for Post-Adoption Communication Agreements*, RUDD ADOPTION RSCH. PROGRAM AT UNIV. OF MASS. AT AMHERST (2019), <https://www.umass.edu/ruddchair/sites/default/files/rudd.allisan.pdf> [<https://perma.cc/UBV5-8H9U>].

<sup>259</sup> *See, e.g.*, Tuke, *supra* note 235.

<sup>260</sup> *See, e.g.*, 12A N.Y. FORMS LEGAL & BUS., *supra* note 257.

- “The birth family may request an in-person visit with the child for a special occasion/on a predetermined date at the discretion of the adoptive parents.”
- “The birth family has the option to view the social media pages of the adoptive family and/or the child. The birth family may ‘friend’ or otherwise add the child on a social media page with the adoptive parents’ permission.”
- “For the purposes of this agreement, ‘birth family’ may be defined broadly, including grandparents, siblings, and half-siblings.”<sup>261</sup>
- “The biological family has a good faith obligation to inform the adoptive parents if the child initiates contact with the birth family on social media without the adoptive parent’s knowledge or consent.”
- “All of the provisions in the agreement must take into account the child’s best interests.”

For adoptive parents wishing to use a post-adoption contact agreement to limit contact between the adoptee and birth family, the following provisions may be useful:

- “The birth family will agree to remove all pictures already posted on their social media platforms and refrain from posting about the child on their social media platforms.”<sup>262</sup>
- “The birth family may not share or post pictures taken from the social media accounts of others, including the adoptive family. The adoptive family expressly prohibits the birth family from posting pictures originating from the adoptive family’s social media pages.”<sup>263</sup>
- “Any contact, whether written or verbal, must be supervised and facilitated by the adoptive family and with the express permission of the adoptive family.”
- “The child may, at any point, elect to terminate contact with the birth family for any reason.”<sup>264</sup>

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<sup>261</sup> Cf. Act Concerning Preserving Familial Connections in Actions Initiated Pursuant to the Children’s Code, and, in Connection Therewith, Making an Appropriation, § 3, 2021 Colo. Session Laws 3426, 3427 (2021), [https://leg.colorado.gov/sites/default/files/document\\_s/2021A/bills/sl/2021a\\_sl\\_481.pdf](https://leg.colorado.gov/sites/default/files/document_s/2021A/bills/sl/2021a_sl_481.pdf) [<https://perma.cc/SR37-8SHK>] (allowing post-adoption contact agreements to include “birth relatives”).

<sup>262</sup> See *Matter of Adoption of E.N.C.*, 458 S.W.3d 387, 389 n.1, 392 (Mo. Ct. App. 2014).

<sup>263</sup> See *Thomas v. Cash*, 423 P.3d 670, 672 (Okla. Civ. App. 2016).

<sup>264</sup> See Bryn Baffer, *Closed Adoption: An Illusory Promise to Birth Parents and the Changing Landscape of Sealed Adoption Records*, 28 CATH. U. J. L. & TECH. 147, 158–59 (2020) (discussing that the child’s right to know their genetic origins does not equate to a birth parent’s right to a relationship with the child).

- “The biological family has a good faith obligation to inform the adoptive parents if the child initiates contact with the birth family on social media without the adoptive parent’s knowledge or consent.”
- “All of the provisions in the agreement must take into account the best interests of the child.”

Without statutory requirements or clear case law to guide attorneys and adoptive families, all participants in the adoption process must take it upon themselves to understand the capabilities of current technology and consider how it could change or grow in the future. Just as adoptive families thirty years ago could not have predicted the impact of DNA technology on post-adoption family life, adoptive families are now only beginning to fully grasp the impact of social media connectivity on the lives of their growing children. It is imperative for adoptive parents to realize, no matter how open or closed the adoption may be, that adoptees can now often locate and communicate with birth families without having to resort to court records.<sup>265</sup>

Organizations and individuals inside adoption circles are having thoughtful conversations on the cultural shift in adoption law.<sup>266</sup> For example, an independent non-profit organization in California recommends adoptive parents seriously consider the possibility that their adoptee could locate their birth family on social media with no support system or boundaries in place.<sup>267</sup> The organization recommends that adoptive parents maintain an open line of communication with their child regarding their adoption story and set age-appropriate restrictions on social media use.<sup>268</sup> Some organizations fear a failure to establish boundaries with adoptees and social media could result in a negative experience as a child comes into contact with their birth families absent adult supervision.<sup>269</sup> Adoptive parents need more resources to help them navigate future contact between their adopted children and their children’s birth parents. Without formal agreements created at the time of the adoption (and even with them depending on how enforceable courts find them to be<sup>270</sup>) families will be entering a new, largely unregulated frontier.

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<sup>265</sup> See Lee, *supra* note 3.

<sup>266</sup> See Dani Shapiro, *Family Secrets*, iHEARTRADIO, <https://www.iheart.com/podcast/105-family-secrets-30131253/?pname=www.familysecretspodcast.com&sc=dnsredirect> [<https://perma.cc/TPR8-RCWN>] (last visited Aug. 29, 2022).

<sup>267</sup> *What Is Open Adoption*, ADVOKIDS (Jan. 2013), <https://advokids.org/legal-tools/open-adoption/> [<https://perma.cc/5T4P-S5VS>].

<sup>268</sup> *Id.*

<sup>269</sup> Harold D. Grotevant, *Open Adoption: Rethinking Family*, RUDD ADOPTION RSCH. PROGRAM AT UNIV. OF MASS. AMHERST (2019), <https://www.umass.edu/ruddchair/sites/default/files/rudd.grotevant.pdf> [<https://perma.cc/VXJ6-REWL>].

<sup>270</sup> See *Nash v. Nash*, 307 P.3d 40, 50 (Ariz. Ct. App. 2013).

*D. Addressing Family Ties and Mental Health*

Considering the rapid societal shifts facing adoptive families, policy makers must rethink the support that laws and courts provide to families. While some policy changes will be based in law, other changes must focus on community and family support. For example, wellness resources are crucial for a family navigating the post-adoption stage.<sup>271</sup> Several resources are available for both the adoptee and the birth parents.<sup>272</sup> For adoptees, there are several Facebook groups dedicated to meeting the various mental health needs of adoptees—these needs include venting, seeking out birth family connections, or offering support to other adoptees.<sup>273</sup> Such communities are especially important considering the increased risk for mental health issues that adoptees face.<sup>274</sup> Adoptive parents can address these issues with a therapist trained to work with those involved with adoption.<sup>275</sup> Perhaps policymakers should develop a post-adoption wellness program that addresses the mental health needs of adoptees in order to help them navigate their new world.

Furthermore, when considering a potential open adoption, law and policy should also take birth parents' mental health needs into account. Birth mothers especially can be susceptible to grief in an open adoption, especially if the adoption

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<sup>271</sup> To demonstrate the importance of considering mental health after adoption, the Florida Department of Children and Families maintains a list of post-adoption service providers, organized by county. See *Post Adoption Services Counselors*, FLA. DEP'T OF CHILD. & FAMILIES, <http://www.adoptflorida.org/contactPACounselor.shtml> [<https://perma.cc/PK7V-58YE>] (last visited Aug. 19, 2022).

<sup>272</sup> See Chobhthaigh & Duffy, *supra* note 160; see also Fabienne Hornfeck, Ina Bovenschen, Sabine Heene, Janin Zimmerman, Annabel Zwönitzer & Heinz Kindler, *Emotional and Behavior Problems in Adopted Children – The Role of Early Adversities and Adoptive Parents' Regulation and Behavior*, 98 CHILD ABUSE & NEGLECT 1 (2019).

<sup>273</sup> See *Americas Taken*, *supra* note 2; see also Adoption Sucks, FACEBOOK, <https://www.facebook.com/groups/10484382277/about> [<https://perma.cc/AHE5-S48D>] (last visited Aug. 19, 2022) (identifying itself as a “support group for those of us who feel we have been harmed by adoption”).

<sup>274</sup> Gina Marie Guarino, *Adopted Children Often Face Mental Health Struggles as Young Adults*, CLAUDIA BLACK YOUNG ADULT CTR. (May 30, 2017), <https://www.claudiablackcenter.com/adopted-children-often-face-mental-health-struggles-as-young-adults/> [<https://perma.cc/N4BQ-SF3K>]. For discussion of mental health and adoptees in the United Kingdom, see Amy Paine, *Adopted Children Can Experience Lasting Mental Health Problems*, NAT'L INST. FOR HEALTH & CARE RSCH. (Aug. 28, 2020), <https://evidence.nihr.ac.uk/alert/adopted-children-can-experience-lasting-mental-health-problems/> [<https://perma.cc/KDX5-AD73>].

<sup>275</sup> CHILDS. BUREAU, U.S. DEP'T HEALTH AND HUM. SERV., FINDING AND WORKING WITH ADOPTION-COMPETENT THERAPISTS (Nov. 2018), [https://www.childwelfare.gov/pubPDFs/f\\_therapist.pdf](https://www.childwelfare.gov/pubPDFs/f_therapist.pdf) [<https://perma.cc/BH94-UY97>] (explaining that “[a]doption-competent therapists” tailor the therapy they offer to allow the child to “heal within the context of new family relationships and with parents who have the skills to support children who come from traumatic beginnings,” and that ideally, the therapist understands the significance of parents and possibly other family members in the treatment process).

occurs shortly after the child's birth.<sup>276</sup> Birth parents likely experience a complex constellation of emotions through an open adoption, including sorrow, anger, and guilt.<sup>277</sup> Though the birth parent's expected joy during post-adoption contact can turn into feelings of sorrow or loss, it is vital that these birth parents keep in mind what their presence in the adoptee's life can mean.<sup>278</sup> Indeed, throughout an open adoption, a birth parent is a well of information regarding genetic history and can help shape the child's sense of identity.<sup>279</sup> The birth parents' relationship with the adoptive parents is also key for the birth parents' mental health in an open adoption.<sup>280</sup> If the relationship is stable and secure, the birth parents may feel more at ease in accepting their diminished role in the adoptee's life.<sup>281</sup> However, if the parties do not get along well, a birth parent may need to develop alternative strategies for having a positive relationship with the adoptee. In the present day, the birth parent's mental health strategies should likely include ways to cope with the possibility of seeing the adopted child's life play out via social media. These expectations place daunting pressures on birth parents.<sup>282</sup>

Finally, authorities recognize the critical role birth siblings can have in navigating open adoption scenarios influenced by social media.<sup>283</sup> Not only is a sibling relationship intrinsically important to an adoptee, but a birth sibling can also play a key role in facilitating online communication between the adoptee and the birth family.<sup>284</sup> Though social media contact is not a perfect substitute for real-life interactions, social media can nonetheless prove invaluable in maintaining relationships in open adoptions.<sup>285</sup>

### *E. Reviving the Right to Be Forgotten*

The above strategies offer promising solutions to parents and families in these modern adoption scenarios. However, these strategies do not fully consider the unique needs of a generation of children growing up with social media. The adopted

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<sup>276</sup> Brenda Romanchik, *Grief and Open Adoption*, AM. ADOPTION CONG., [https://www.americanadoptioncongress.org/open\\_romanchik\\_article.php](https://www.americanadoptioncongress.org/open_romanchik_article.php) [<https://perma.cc/FB7A-T9VM>] (last visited Aug. 19, 2022) (explaining the intense emotions birth parent experience as they cope with the shock of loss accompanied by the emotional intensity of the birth process—often, these emotions are typically followed by a denial to minimize the loss).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Romanchik, *supra* note 276.

<sup>283</sup> Anne Marie Shier, *Negotiating Reunion in Intercountry Adoption Using Social Media and Technology*, 51 BRITISH J. SOC. WORK 408, 415–16 (2021) (finding that adoptees utilize social media to contact siblings far more often than birth parents).

<sup>284</sup> *Id.* at 415.

<sup>285</sup> *Id.* at 419–20.

children initially discussed in the introduction—Nora, Jake, and Sophia—have public digital footprints that disclose their adoptive status to the entire world. This digital presence limits their ability to enter adulthood free to define themselves online on their own terms. While they may be comfortable with the digital trail left in their non-traditional childhood's wake, they may just as likely grow up to resent having such a public family story and may wish to be able to control the narrative defining their unique history.

One solution might lie in a centuries-old doctrine known as the Right to Be Forgotten. The Right to Be Forgotten recognizes that individuals may have a right to have information no longer relevant to their reputation or name “forgotten” in the public sphere.<sup>286</sup> While this legal doctrine existed long before social media, the European Union has recognized that it also applies in the context of online sharing.<sup>287</sup> Courts have required, for example, that Google break links between an individual's name and unfavorable news articles published years ago but are no longer accurate reflections of the individual's current self.<sup>288</sup> The Right to Be Forgotten thus embraces the idea that a person has a right to privacy regarding their past and provides a legal remedy when such outdated information is published online.<sup>289</sup> This doctrine enforces online privacy by allowing individuals to control their digital footprint.<sup>290</sup>

While all children may benefit from a Right to Be Forgotten, this right is especially important for children impacted by foster care and adoption. As minors, children are generally subject to the parents' prerogatives when posting on social media.<sup>291</sup> However, for foster children uniquely, these prerogatives are delegated to state agents. State normalcy laws give foster parents discretion to allow children in their care to participate on social media, requiring only a reasonably prudent parent

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<sup>286</sup> See Steinberg, *supra* note 26, at 864; see also Case 131/12, Google Spain SL vs. Agencia Española de Protección de Datos (AEPD), 2014 E.C.R.

<sup>287</sup> See, e.g., Megan Deitz, Note, *A Crime Remembered: The Possible Impact of the “Right to Be Forgotten” in the United States for Crime Victims, Criminal Defendants, and the Convicted*, 9 ALA. C.R. & C.L. L. REV. 197 (2018) (arguing for adoption of the Right to be Forgotten doctrine in the United States tailored to victims of crime, certain defendants and specific convicted individuals in a way that still respects other freedoms).

<sup>288</sup> Stacey Steinberg, *How Europe's “Right to Be Forgotten” Could Protect Kids' Online Privacy in the U.S.*, WASH. POST (July 11, 2018, 9:00 AM), <https://www.washingtonpost.com/news/parenting/wp/2018/07/11/how-europes-right-to-be-forgotten-could-protect-kids-online-privacy-in-the-u-s/> [<https://perma.cc/P6J2-H4K3>].

<sup>289</sup> Amy Gajda, *Privacy, Press, and the Right to Be Forgotten in the United States*, 93 WASH. L. REV. 201, 203 (2008).

<sup>290</sup> Steinberg, *supra* note 26, at 864.

<sup>291</sup> *Id.* at 865.

standard.<sup>292</sup> Those seeking to adopt may post their adoption journey online, including sharing images or personal information about the child in the process.<sup>293</sup>

While children might take issue with what foster parents share, they might also take issue with what their biological parents share online. Principles of Free Speech often allow biological parents to share about the child online, regardless of their current legal relationship with a child.<sup>294</sup> Moreover, parents whose parental rights were terminated can turn to a myriad of Facebook groups to share their own experiences, including posting information about the child in the hopes that social media will facilitate an eventual reunion.<sup>295</sup>

Legal scholars have debated whether a Right to Be Forgotten could fit within the bounds of American Free Speech law.<sup>296</sup> Many commentators contend that the Right to Be Forgotten is fundamentally incompatible with American Free Speech protections.<sup>297</sup> However, in her article *Privacy, Press, and the Right to Be Forgotten in the United States*, Professor Amy Gajda argues that the Right to Be Forgotten has already been embraced in the American legal system.<sup>298</sup> Historically, American courts have weighed privacy interests against press interests.<sup>299</sup> Gajda points out that a surprising amount of the time, privacy interests win out.<sup>300</sup> The Restatement (Second) of Torts evidences the history of privacy protections in a section titled “Publicity Given to Private Life.”<sup>301</sup> When private information about a person is disbursed, publishers are open to liability if the disclosures were “highly offensive to a reasonable person” and “not of legitimate concern to the public.”<sup>302</sup> Like the Right to Be Forgotten, the Restatement indicates an individual’s right to privacy in their past.<sup>303</sup> Citing to decades of common law foundation, Gajda makes a compelling case that the Right to Be Forgotten has long been an aspect of the American legal system in some form.<sup>304</sup>

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<sup>292</sup> See FLA. STAT. § 409.145; TEX. FAM. CODE § 264.001(5).

<sup>293</sup> E.g., Shapiro, *supra* note 6; see also Caitlin Moscatello, *Un-Adopted: YouTubers Myka and James Stauffer Shared Every Step of Their Parenting Journey. Except the Last.*, THE CUT (Aug. 18, 2020), <https://www.thecut.com/2020/08/youtube-myka-james-stauffer-huxley-adoption.html> [<https://perma.cc/6SK2-UETG>].

<sup>294</sup> See *Nash v. Nash*, 307 P.3d 40, 49–50 (Ariz. Ct. App. 2013).

<sup>295</sup> E.g., Americas Taken, *supra* note 2.

<sup>296</sup> See, e.g., Gajda, *supra* note 289.

<sup>297</sup> See Mark Scott, *French Official Campaigns to Make ‘Right to be Forgotten’ Global*, N.Y. TIMES: BITS (Dec. 3, 2014, 4:19 PM), <https://archive.nytimes.com/bits.blogs.nytimes.com/2014/12/03/french-official-campaigns-to-make-right-to-be-forgotten-global/> [<https://perma.cc/VJ9Y-QMYN>]; see also John Timpane, *Can the Internet Learn to Forget?*, PHILA. INQUIRER (June 28, 2014), [https://www.inquirer.com/philly/news/nation\\_world/20140628\\_Can\\_the\\_Internet\\_learn\\_to\\_forget\\_.html](https://www.inquirer.com/philly/news/nation_world/20140628_Can_the_Internet_learn_to_forget_.html) [<https://perma.cc/7LYQ-AB4A>].

<sup>298</sup> Gajda, *supra* note 289, at 206.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> RESTATEMENT (SECOND) OF TORTS § 652(d) (AM. L. INST. 1977).

<sup>302</sup> *Id.*

<sup>303</sup> Gajda, *supra* note 289, at 207.

<sup>304</sup> *Id.* at 221.

Recently, Google has developed a new policy that lets parents keep “children’s pictures private, and in some cases, images of adults, too.”<sup>305</sup> This new policy states that if a picture of someone under eighteen appears on a Google Image Search, that person or their parents or guardians may ask Google to remove the image.<sup>306</sup> To achieve this removal, the individual, their parent, or guardian must make a request through the link provided by Google and then fill out the information asked.<sup>307</sup> Google states that it “will notify you when . . . the image [is taken] down” but only “if the request meets the company’s requirements.”<sup>308</sup> Overall, Google states that the “only exceptions to its image removal policy for minors are situations where there [is] a compelling public interest to keep the image up, or if the image is newsworthy.”<sup>309</sup> This policy raises questions about what constitutes a compelling public interest and raises concerns as to who is making those decisions. Furthermore, removing the image from Google is not “the same thing as removing it from the Internet.”<sup>310</sup> The image “will still appear on the web page the search results are pointing to, and the image may still turn up in other search engines, as well.”<sup>311</sup> The efforts made by private companies are a step in the right direction, but more action is required to protect the interests of the children whose pictures remain online. State or federal legislatures could introduce laws that give foster and adopted children even better tools to control the dissemination of their unique (and at times painful) family history by offering them a Right to Be Forgotten in even more contexts. Ultimately, the deeply personal experience of foster care or adoption becomes an irreversible facet of these children’s digital footprint. However, the Right to Be Forgotten doctrine offers a remedy for a child who, later in life, may wish for this information to be private. The ability to control the dissemination of their unique family history will give them control over their lives and future.

#### CONCLUSION

The last decade has seen unprecedented changes in how individuals interact online. From social media to the COVID-19 pandemic, our relationships with one another have changed. For separated parents and families impacted by adoption and foster care, these changes have occurred far more quickly than the law’s ability to keep up. Lawyers must be aware of how social media’s potential for connection will impact the lives of the families they serve. This Article offers a unique overview of

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<sup>305</sup> Thomas Germain, *How to Remove Pictures of Kids from Google Search Results*, CONSUMER REPS. (Oct. 27, 2021), <https://www.consumerreports.org/privacy/how-to-remove-pictures-of-kids-from-google-search-results-a6598761050/> [<https://perma.cc/VFA9-4GZH>].

<sup>306</sup> *See id.*

<sup>307</sup> *See id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*



social media's impact on intrafamilial relationships, and it provides important advice for policy makers as they consider ways to improve outcomes for parents and children.

Ultimately, the children described in the vignettes at the beginning of this Article will likely come face-to-face with their adoption stories. In an ideal world, narratives such as these will have been shared only by people they have come to love and trust, and they will enter adulthood feeling empowered to tell their adoption story on their terms. But these vignettes also offer a cautionary tale—these children must trust their caregivers and other adults in their lives to share their stories in a manner that respects their privacy and promotes their well-being. When private courtroom stories enter public social media newsfeeds, the well-intentioned actions of adults in finding children a *forever family* may ultimately cause harm to their *forever identities*. Indeed, though the need for family is very important, it should not come at the cost of a child's future ability to define themselves in their own time, in their own way, and on their own terms.