

**ON TREND: CONTINUING THE EFFORT TO INSPIRE
FASHION INDUSTRY REFORM AND PROTECT UNDERAGE
FASHION MODELS**

Anais V. Paccione^{*}

I. INTRODUCTION	418
II. THE FASHION AND MODELING INDUSTRY AS AN “AESTHETIC” MARKET: THE UNDERAGE MODEL EXPERIENCE.....	418
A. <i>Systemic Hurdles to Entering the Fashion Industry</i>	419
B. <i>Youth as a Point of Vulnerability</i>	423
III. CHILD PERFORMERS AND THE LAW	428
A. <i>Existing Legal Protections</i>	428
B. <i>Proposed Federal Bill: The Child Performers Protection Act of 2015</i>	430
IV. IMPROVING THE REFORM EFFORT	434
A. <i>Interpreting the Text of the Child Performers Protection Act: Proposed Changes</i>	434
B. <i>Strengthening the Law Through Industry Changes</i>	436
V. CONCLUSION	440

^{*} J.D. Candidate, Seton Hall University School of Law (May 2017); B.A. Vassar College (May 2014). I would like to thank Professor Brian Sheppard for his guidance and his insight into this topic, along with the Seton Hall Law Legislative Journal team for their hard work in preparing this Note for publication. Thank you to my friends and family for the love, support, and consistent optimistic advice.

I. INTRODUCTION

Fashion law is rapidly growing as a legal discipline and as an important facet of jurisprudence. It is characterized as a subspecialty of business law and encompasses different legal disciplines such as intellectual property, customs, real estate, employment, and advertising law.¹ While much of fashion law has to do with the designs, trademarks, and day-to-day business issues of the world's fashion houses, there is plenty to be examined regarding the models that bring fashion to life.

This Note will argue that federal legislation must address the systemic abuses suffered by underage models in the fashion industry. It will begin by outlining background information on the industry, highlighting noteworthy developments in the protection of models and lingering pitfalls in the current state of the fashion industry. Legal scholarship on the subject of underage models ranges from exposing the hardship endured by these young girls to proposing an outright ban on underage models in fashion week and editorial work. Nevertheless, the fact of the matter is that models of all ages face exploitation, and the solution lies in changes to the industry as a whole, and not just a ban on underage models. Therefore, this Note will propose ways in which underage models may remain involved in the fashion industry with adequate safeguards while avoiding the dangers and risks the industry presents. In doing so, this Note will examine how child performers are protected and unpack why these protections have been less effective with respect to underage models. This Note will focus on the proposed Child Performers Protection Act of 2015 as it is currently written, analyzing its strengths and suggesting how it may be altered to reach even greater protection for underage models.

For the purposes of this Note, "child models" refers to female high fashion models under the age of eighteen.² High fashion models are models whose main projects include runway shows, magazine editorials, and high-end advertising campaigns.³ Although underage models face a multitude of injustices within the fashion industry, this Note will focus on wage and time exploitation.

II. THE FASHION AND MODELING INDUSTRY AS AN "AESTHETIC"

¹ Guillermo C. Jimenez, *Fashion Law: Overview of a New Legal Discipline*, in *FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS* 3, 3 (Guillermo C. Jimenez & Barbara Kolsun ed., 2010).

² *But see* ROGER TALLEY, *THE PROFESSIONAL'S GUIDE TO MODELING: A COMPREHENSIVE LOOK AT THE BUSINESS OF BEING A MODEL* 150 (2007) (noting that the line between "child" and "not child" may be anywhere from twelve to eighteen).

³ *See id.* at 155.

MARKET: THE UNDERAGE MODEL EXPERIENCE

Much of the public is unaware of the fact that many of the models who appear in high fashion advertisements and runway shows are minors under the age of eighteen.⁴ The dangers of the industry, such as exploitation and sexual harassment, fall hardest on them.⁵ Models, in general, lack adequate legal protection, but minors are doubly disadvantaged as modeling agencies and designers take advantage of their youth, naiveté, and pure determination to be successful in the industry. There are several factors to which we may attribute the unique power imbalance between underage models and their agencies: the nature of the fashion industry itself, unclear prospects of success, entry costs for models, geographic barriers, age preferences, and the promise of fame.

A. Systemic Hurdles to Entering the Fashion Industry

The fashion industry is built on a system of obsolescence, as it is an economic market held up by non-economic, cultural elements, such as style, beauty, and aesthetics.⁶ The business remains successful as aesthetic qualities are ascribed meanings, generated around commodities, and thus develop “aesthetic value.”⁷ The constantly changing qualities of style and appearance must be stabilized for a short period of time to generate value, and the most obvious example of these periods of time are the different fashion “seasons.”⁸ It follows that fashion models’ aesthetic values are also subject to constant temporal fluctuations, as models are the vehicles through which fashion trends are communicated to the world.⁹ The constant change is intertwined with economic value—the season’s “new face” can “sell” for a higher price in the beginning of the season, but may be worth nothing by the end.¹⁰ In that sense, a model’s economic value is perpetually undermined by the fashion market’s momentum of change, as another “new face” or new, hot brand

⁴ *Industry Analysis*, MODEL ALLIANCE, <http://modelalliance.org/industry-analysis> (last accessed Mar. 14, 2017).

⁵ See discussion, *infra*, Part II.B; see also Jennifer Sky, *When Will the Fashion Industry Treat Underage Models Like the Children They Are?*, NEW REPUBLIC (Feb. 23, 2015), <https://newrepublic.com/article/121125/new-child-labor-law-meets-fashion-unhealthy-obsession-youth> (recounting how Sky, an underage model, was “photographed nude at 16, unknowingly pimped to Wall Streeters, groped countless times,” and “forced to work 16-hour days” because the Child Model Law had not been enacted).

⁶ JOANNE ENTWISTLE, *AESTHETIC ECONOMY OF FASHION: MARKETS AND VALUE IN CLOTHING AND MODELLING* 28 (2009).

⁷ *Id.* at 28.

⁸ *Id.* at 29.

⁹ See generally *id.*

¹⁰ *Id.* at 51.

will inevitably come to the forefront.¹¹ Therefore, the fashion industry is built upon novelty, with a fast turnover in product and labor.¹² Models' visual aesthetics, which serve as their product, come in and out of fashion just like the clothing. Thus, there is a fast turnover in their labor as well.¹³ In this way, the fashion seasons create a sense of volatility.

The prospect of success for models is unclear. In the fashion industry, aspects that are subjectively and inherently cultural, such as physical appearance, are commodified and sold.¹⁴ Those in power controlling the market must project their ideas of what is beautiful onto consumers, trading and selling a specific aesthetic quality.¹⁵ Modeling agencies invest in careers that they forecast as marketable.¹⁶ They promote the particular looks they believe will sell. Despite this typical business structure, there is an inherent risk in forecasting particular looks because the agency's expertise is not always enough to predict the outcome of an investment in a young model.¹⁷ Fashion model careers are notoriously short-lived.¹⁸ The models only have a season or two to make a great impression on fashion designers, fashion journalists, and the rest of the moguls who control the industry.¹⁹ If they do not succeed, their career may be over sooner than they expect.²⁰

¹¹ ENTWISTLE, *supra* note 6, at 51.

¹² ENTWISTLE, *supra* note 6, at 53.

¹³ ENTWISTLE, *supra* note 6, at 53-54.

¹⁴ See generally Video: *Fashion Industry Standards: Debate over Model Appearance, Size*, CBS NEWS (Feb. 17, 2015), <http://www.cbsnews.com/videos/fashion-industry-standards-debate-over-model-appearance-size/> (scrutinizing the modeling industry and unrealistic beauty standards presented to women); see also ENTWISTLE, *supra* note 6, at 10, 28 (explaining how aesthetic value is generated in the fashion industry).

¹⁵ ENTWISTLE, *supra* note 6, at 10, 53-54.

¹⁶ ENTWISTLE, *supra* note 6, at 51.

¹⁷ See generally Kathleen Green, *Modeling: More Than a Pretty Face*, 39 OCCUPATIONAL OUTLOOK QUARTERLY 2 (1996). Modeling agency bookers gain expertise in predicting what types of looks will be marketable to their particular clients, according to fashion cycle trends. *Id.* However, extenuating factors come into play: the ever-changing trends and also how the model interacts with the client and other models hopeful to get the job. *Id.*

¹⁸ *Infographic: The International Model Supply Chain*, PBS, <http://www.pbs.org/pov/girlmodel/infographic-model-fashion-industry/> (last accessed Mar. 14, 2017) (stating that the length of the average modeling career is five years). See Antonella Ciancio, *Catwalk Queens Prepare for a Less Glamorous Future*, REUTERS (Feb. 28, 2012), <http://mobile.reuters.com/article/lifestyleMolt/idUSTRE81R17K20120228>; see also Georgina Wilkin, *Former Model: 'What Young Girls Can Learn from My Anorexia'*, TELEGRAPH (Sept. 20, 2013), <http://www.telegraph.co.uk/women/womens-life/10323519/Former-model-What-young-girls-can-learn-from-my-anorexia.html>.

¹⁹ ENTWISTLE, *supra* note 6, at 52; see also Ciancio, *supra* note 18 (“[T]he chances of a long-term career for most of the girls at the shows these days are much lower than they were during the heady 1990s . . .”).

²⁰ See Ciancio, *supra* note 18 (demonstrating how most of the models walking in fashion

Economic success depends upon how much exposure models obtain.²¹ For example, models who participate in New York Fashion Week are lucky if they end the marathon-like seven days with more than a few thousand dollars to show for it.²² Many models hope to simply break even if they are booked for several shows, meaning that they will be able to cover travel and living expenses during fashion weeks.²³ Typically during this time, models will—without pay—attend castings, clothing fittings, and parties.²⁴ At fashion shows, they tend to earn between no cash, at worst, and \$2,500 to \$5,000, at best.²⁵ All too often, models leave New York Fashion Week in debt.²⁶ It may seem unfathomable to an outsider that models would go through all this financial trouble just to appear in a fashion week, but the reality is that Fashion Weeks provide exposure that could lead to major designer and editorial campaigns for models hoping to jumpstart their careers.²⁷ Thus, these models take a risk attending Fashion Week not knowing whether they will attain the success they desire.

Breaking into the modeling industry is exceptionally difficult. The modeling industry is always looking for a new face.²⁸ There is a collective effort involved in modeling work, and an array of actors and processes combine to create a model's value. In other words, a model's value is not only intrinsic, but is also dependent on processes and variables out of her control.²⁹ Some bookers have stated that they hire models who embody some kind of “striking” or “ethereal” quality rather

week are already preparing for alternative future careers, knowing that most modeling careers are short-term).

²¹ See Rose Hackman, *Model Life: To Call It Indentured Servitude Is No Exaggeration*, THE GUARDIAN (Feb. 19, 2015), <http://www.theguardian.com/fashion/2015/feb/19/model-life-indentured-servitude-no-exaggeration>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*; see also ENTWISTLE, *supra* note 6, at 55.

²⁵ See Hackman, *supra* note 21.

²⁶ See Hackman, *supra* note 21.

²⁷ See Hackman, *supra* note 21 (explaining that catwalks are where “faces” get “discovered,” and discovery might lead to major campaigns or editorial work, which pay more than runway modeling); see also Janelle Okwodu, *Two Models Weigh in on What It's Really Like to Walk in More Than 100 Fashion Shows*, VOGUE (Sept. 11, 2015), <http://www.vogue.com/13333795/fashion-week-models-harleth-kuusik-alexandra-elizabeth/> (interviewing two models who successfully walked in over one hundred shows in one year and discussing how the exposure led them to walk for some of the most prominent designers, such as Prada, Louis Vuitton, and Proenza Schouler).

²⁸ “New faces” is a term agencies use to differentiate new recruits to their agencies from past seasons' models. See *NEWfaces*, MODELS.COM, <https://models.com/newfaces/> (last accessed Mar. 14, 2017).

²⁹ See ENTWISTLE, *supra* note 6, at 58.

than conventional beauty.³⁰ That “certain something” is so unpredictable, subjective, and vague that models are forced to take a big risk when deciding to enter the profession—how can they know if they have that special quality that will draw a modeling agency’s attention? The “look” of the season is not self-evident until the season has passed.³¹ This is why models present themselves to modeling agencies and bookers in droves, hopeful that they have something to offer.³² The nature of the industry is that faces are disposable to agencies managing them, as new fresh faces enter the scene every season.³³ Because no education, training, or work experience is necessary to enter the modeling industry, there are a disproportionately large number of applicants competing for few job openings.³⁴

Additionally, the modeling industry creates geographic restraints despite the global market for models.³⁵ Increasingly, modeling agencies are establishing themselves in the world’s fashion cities, making up a major part of the “new economy” built upon cultural goods and services, as the fashion industry itself trades cultural commodities.³⁶ The modeling industry is simultaneously global and local. Fashion modeling jobs are located in major cities, each city having its own fashion week.³⁷ The four locations deemed most important are New York, London, Paris, and Milan.³⁸ Other cities have followed suit in developing their own notable fashion weeks, such as Miami, Copenhagen, Sydney, Madrid, and Shanghai.³⁹ Models frequently travel for work, but their work is also stagnant within the local economy of certain cities.⁴⁰ The very survival

³⁰ ENTWISTLE, *supra* note 6, at 58.

³¹ See ENTWISTLE, *supra* note 6, at 60.

³² See Green, *supra* note 17 (advising models to go on as many go-sees as they can to increase their visibility and to be prepared to face rejection).

³³ Jennifer Sky, *Does Fashion Week Exploit Teen Models?*, DAILY BEAST (Sept. 14, 2014), <http://www.thedailybeast.com/articles/2014/09/14/does-fashion-week-exploit-teen-models.html> (“The message models receive is loud and clear: this is what it is to be a model, and you must deal with it or get out. There are 1,000 others waiting to take your place.”).

³⁴ See generally BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, MODELS: OCCUPATIONAL OUTLOOK HANDBOOK (DEC. 17, 2015), <http://www.bls.gov/ooh/sales/models.htm#tab-6>.

³⁵ See ENTWISTLE, *supra* note 6, at 53.

³⁶ ENTWISTLE, *supra* note 6, at 53.

³⁷ See generally, *Calendar*, MERCEDES-BENZ FASHION WEEK, <http://mbfashionweek.com/calendar> (last accessed Mar. 14, 2017).

³⁸ *Id.*; see JULIE BRADFORD, FASHION JOURNALISM 129 (2013) (“Traditionally, the four big fashion capitals that get the lion’s share of coverage are New York, London, Milan, and Paris.”).

³⁹ See ENTWISTLE, *supra* note 6, at 54.

⁴⁰ ENTWISTLE, *supra* note 6, at 54.

of modeling agencies depends upon building close institutional and social relationships with fashion houses within the city, which serve as the modeling agencies' clients.⁴¹ It follows that models, like agencies, must be based in cities where the most important clients and fashion houses are located as much of the models' time is spent meeting face-to-face with clients, especially in the early stages of a modeling career.⁴² Additionally, modeling agencies send the model's portfolio book to clients overseas to try to get her foot in the door to fashion markets abroad.⁴³ As models gain experience in their home city, often times their career comes to a plateau. To regain momentum, agencies will "ship off" a model to another market across countries or continents.⁴⁴ In this way, the modeling industry has a local character with a global reach, and models have little to no choice to either stay or move pursuant to their agency's directions.⁴⁵

B. Youth as a Point of Vulnerability

History shows that models are most desirable as potential workers when they are young. The fashion industry has convinced consumers that clothes look better on thin, tall people.⁴⁶ Teenagers tend to be more naturally thin than young adult women because their bodies have not fully matured.⁴⁷ Because thinness is the beauty ideal in our consumer culture, the fashion industry perpetuates that norm by hiring underage models.⁴⁸ A model's youth is repeatedly manipulated to subordinate the model into a space of vulnerability as the girls are controlled by their agencies and fashion photographers.⁴⁹ After a certain age, a model's career comes to a halt.⁵⁰

Statistics demonstrate the ways in which youth often renders these

⁴¹ ENTWISTLE, *supra* note 6, at 54.

⁴² ENTWISTLE, *supra* note 6, at 54.

⁴³ ENTWISTLE, *supra* note 6, at 54.

⁴⁴ ENTWISTLE, *supra* note 6, at 54. *See* Hackman, *supra* note 21.

⁴⁵ *See* ENTWISTLE, *supra* note 6, at 54.

⁴⁶ Sara Ziff, *Opinion: Why Children Shouldn't Be Fashion Models*, CNN (Dec. 4, 2015), <http://www.cnn.com/2015/10/28/opinions/underage-fashion-models-concerns/>.

⁴⁷ *See id.* (stating that starting a modeling career young is "not good for the girl, because her body will develop and change, and if she has had success at a very young age and she's valued for her adolescent physique, then she will be pressured to maintain those measurements").

⁴⁸ *See id.* (explaining how underage models are not good for the greater public when children are representing the feminine ideal of beauty for women).

⁴⁹ *Id.* (Sara Ziff recounted her experience as an underage model, recalling that children are more eager to please their superiors because they may not know any better.).

⁵⁰ *See* Ciancio, *supra* note 18 and accompanying text.

girls hopeless. In June 2013, the Independent Democratic Conference (“IDC”) released a report titled “New York’s Modeling Crisis: The Importance of Providing Legal Protections for Child Models.”⁵¹ The IDC began an investigation because underage models were not receiving the protections granted to other types of child performers, such as stage and film actors.⁵² It conducted a survey that determined that only twenty-nine percent of models experiencing some form of abuse in the workplace were comfortable with reporting it to their modeling agency due to fear of retribution.⁵³ Since adult models face such reluctance and unease, underage models are likely to have even greater fears of retaliation from their agencies.⁵⁴

Youth becomes a vulnerable point for underage models during contract negotiations as well. Under the common law, a minor employed as a performer may disaffirm her talent agreements once she reaches the age of majority.⁵⁵ In some jurisdictions, notably New York, if the parties had an agreement approved by the New York Supreme Court or the New York Surrogate’s Court, it may not later be disaffirmed.⁵⁶ However, seeking court approval of contracts for minors proves to be an additional process that some consider futile.⁵⁷ This disaffirming process is one that underage models typically avoid to maintain good working relationships with their agencies.⁵⁸ Upon signing with an agency, underage models often sign nearly unconscionable agreements that are difficult to nullify.⁵⁹

⁵¹ N.Y. STATE INDEP. DEMOCRATIC CONFERENCE, NEW YORK’S MODELING CRISIS: THE IMPORTANCE OF PROVIDING LEGAL PROTECTIONS FOR CHILD MODELS 1, 2 (2013) (“In 2011, the fashion industry employed 165,000 people, generated \$1.7 billion in tax revenue, and brought in \$55 billion in sales.”).

⁵² *Id.*

⁵³ *Id.* at 7.

⁵⁴ See MODEL ALLIANCE, *supra* note 4 (stating that few models who experienced sexual harassment on the job told their agencies about it, and a fraction of models who did report harassment found that their modeling agency did not see a problem).

⁵⁵ Jessica Krieg, Comment, *There’s No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 430 (2004) (explaining that under the infancy doctrine, a contract entered into during minority may be disaffirmed upon reaching legal age).

⁵⁶ Ashima Dayal et al., *Marketing, Advertising, and Promotion*, in FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS 221, 238 (Guillermo C. Jimenez & Barbara Kolsun ed., 2010).

⁵⁷ *Id.* (The authors describe the court approval process as “cumbersome, time-consuming, and expensive, and is by no means guaranteed.” The authors suggest that advertisers consider hiring young-looking models rather than actual minors, to avoid the risk of minors disaffirming their contracts and ultimately forcing advertisers to end advertising campaigns featuring the model.).

⁵⁸ *Id.*

⁵⁹ See Sky, *supra* note 33 (explaining how models are controlled by their agencies and are “forced to sign multi-year, one-sided contracts without the ability to opt out if the relationship goes south”).

The binding relationship between models and their agencies has been likened to “indentured servitude” as models accrue thousands of dollars of debt within their agencies.⁶⁰ Initially, agencies will cover the cost of models’ travel, living, and casting expenses, but the models’ debt adds up.⁶¹ The debt eventually turns into a form of leverage for the agencies.⁶² Models are essentially forced into completing assignments they do not wish to undertake—similar to indentured servitude.⁶³ Additionally, modeling agency contracts continue to classify models as independent contractors while their true status resembles more of an employer-employee relationship with agencies. This creates reoccurring problems regarding models’ rights in regards to payment and workplace conditions.⁶⁴

Modeling agents are able to gain even more leverage on aspiring underage models using hypothetical currency—fame. The promise of fame, unsurprisingly, could be enough to lead a young party to contract her rights away.⁶⁵ Studies show that people are easily swayed by the prospect of fame because they find fame even more desirable than wealth.⁶⁶ In today’s social media age, the perks of being a famous model are observable simply by following supermodels on Instagram, Twitter, and Snapchat.⁶⁷ Many of today’s supermodels have significant

⁶⁰ See Hackman, *supra* note 21.

⁶¹ Hackman, *supra* note 21.

⁶² Hackman, *supra* note 21.

⁶³ Hackman, *supra* note 21.

⁶⁴ See *infra* Part III.B (discussing models’ status as independent contractors).

⁶⁵ See generally Yalda T. Uhls, *Kids Want Fame More Than Anything*, HUFFINGTON POST (Jan. 19, 2012), http://www.huffingtonpost.com/yalda-t-uhls/kids-want-fame_b_1201935.html; see also Patricia Greenfield & Yalda T. Uhls, *The Rise of Fame: An Historical Content Analysis*, 5 CYBERPSYCHOLOGY: J. OF PSYCHOSOCIAL RES. ON CYBERSPACE 1 (July 2011), <http://cyberpsychology.eu/view.php?cisloclanku=2011061601&article=1> (hypothesizing that changes in multimedia content and the possibilities for the construction of fame on social media may have an impact on the goals and desires of teenagers).

⁶⁶ Greenfield & Uhls, *supra* note 65; see also Daryl Nelson, *Why are Young People So Obsessed with Becoming Famous?*, CONSUMER AFFAIRS (Jan. 21, 2013), <http://www.consumeraffairs.com/news/why-are-young-people-so-obsessed-with-becoming-famous-012113.html>.

⁶⁷ Tracy Lomerantz Lester, *It Pays to Be Social*, CR FASHION BOOK, <http://www.crfashionbook.com/book/it-pays-to-be-social/> (last accessed Mar. 14, 2017) (detailing how popular models create lasting monetary and social value by building a digital portfolio on social media, “giving fans a glimpse into what they eat, where they shop, and perhaps most importantly, how many fellow models comprise their squad in a socially-dominated landscape”); see also Nikki Ogunnaike, *42 Snapchat Accounts to Stalk During New York Fashion Week*, ELLE (Feb. 8, 2016), <http://www.elle.com/fashion/news/a33926/editors-bloggers-brands-snapchat/> (listing the best model accounts to follow in order to “keep up” with this season’s New York Fashion Week). The smartphone app, Snapchat, has begun covering fashion week in each of the major cities

followings on social media.⁶⁸ It has become widely known that some of the most successful models can make thousands of dollars for a single advertisement post on Facebook, Twitter, or Instagram.⁶⁹ Many struggling models speculate that one of the grim reasons for the lack of attention in protecting models is the pervasive stereotype that models live glamorous lives of luxury and their work is inherently easy to perform.⁷⁰ The fashion and modeling industries exploit the status of being a model as an incentive to completing the labor of walking the runways and participating in photoshoots. The prestige of being a high-fashion model may be another reason why these models accept unfavorable labor conditions.⁷¹

Despite the passage of a bill in New York in 2013, which added underage models to the definition of “child performers” thereby granting them labor law protections, there is evidence that some of the highest names in fashion continue to employ underage models and pay models “in trade.”⁷² Recent editorials and Fashion Weeks demonstrate that the regulations have not substantially impacted the industry in a positive way.⁷³ It has been over a year since this legislation went into effect, and there are still underage models opening some of the biggest fashion shows in 2015.⁷⁴ One model stated that she worked from 8:00 am to 8:00 pm on most days during the 2015 Spring New York Fashion Week and received no pay—working pro bono or for trade.⁷⁵ This inconsistency

with behind-the-scenes short video footage of fashion houses, models, influencers, and stylists. *Id.*

⁶⁸ See Brooke Shunatona, *You Won't Believe How Much Kendall Jenner and Gigi Hadid Make for a Single Post on Social Media*, COSMOPOLITAN (Dec. 16, 2015), <http://www.cosmopolitan.com/style-beauty/fashion/news/a50910/models-on-social-media> (stating that social media presence and the number of followers a model has is now a crucial factor in how likely a model is to be hired).

⁶⁹ *Id.* (noting that top supermodels can make up to six figures for a post on Instagram); see also Lester, *supra* note 67.

⁷⁰ See Hackman, *supra* note 21.

⁷¹ Hackman, *supra* note 21.

⁷² N.Y. Lab. Law § 150 (McKinney 2017) (Section 150 was amended in 2013 to add “runway or print model” to the definition of child performers.); Eric Wilson, *Jacobs Flouts Age Limit*, N.Y. TIMES (Feb. 15, 2012), http://www.nytimes.com/2012/02/16/fashion/marc-jacobs-and-underage-models.html?_r=1. Marc Jacobs knowingly hired two underage models, ages fourteen and fifteen, for his fashion show—contrary to the promise of the Council of Fashion Designer’s proposal to refrain from hiring models under age sixteen. Jacobs stated, “I do the show the way I think it should be, and not the way somebody tells me it should be.” *Id.*

⁷³ Vanessa Friedman, *Underage Models Return to the Runway and Reignite a Debate*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/fashion/underage-models-return-to-the-runway-and-reignite-a-debate.html?_r=1.

⁷⁴ *Id.*

⁷⁵ Jennifer Sky, *Models of the World, Unite!*, NEW REPUBLIC (Mar. 5, 2015),

2017]

ON TREND

427

and lack of change in state legislation demands that federal action be initiated to protect all child performers, especially underage models.

The ideal modeling career sparkles with luxury and glamour, but the reality of the job entails long hours and low pay with no job security for the majority of professional models.⁷⁶ Paradoxically, “culturally desirable jobs bring lowered expectations of economic stability.”⁷⁷ Models must do all they can to gain some sort of notoriety and stand out from the rest so they go beyond the castings and go-sees provided by modeling agencies.⁷⁸ Some models must become entrepreneurs and managers of themselves.⁷⁹ The entrepreneurial work of fashion models includes showing up to social and cultural activities and events outside of work to network and do business.⁸⁰ This blurred line between work and play includes “compulsory ‘schmoozing’ or socializing within the industry after the workday.”⁸¹ This kind of environment is especially dangerous for underage models because they are exposed to alcohol and the partying scene at a young age.⁸²

Some legislators and fashion industry advocates have gone as far as to propose a complete ban on underage models.⁸³ However, a ban on underage models does not further the government’s interests in both protecting underage models and utilizing the fashion industry to promote economic growth.⁸⁴ Some critics advise designers to refuse underage

<http://www.newrepublic.com/article/121223/fashion-pays-most-models-terribly-if-all-they-should-organize>.

⁷⁶ See generally Hackman, *supra* note 21 (discussing several models’ experiences with the modeling industry).

⁷⁷ ENTWISTLE, *supra* note 6, at 55.

⁷⁸ “Go-sees” are castings where models meet agencies and clients for the first time. They typically will present their walk and portfolio in hopes of making a lasting impression. See Tyra Banks’s *Modeling Tips*, SEVENTEEN MAGAZINE (Nov. 18, 2011), <http://www.seventeen.com/fashion/news/a16797/tyra-banks-modeling-tips/>.

⁷⁹ See Lester, *supra* note 67.

⁸⁰ See ENTWISTLE, *supra* note 6, at 55.

⁸¹ ENTWISTLE, *supra* note 6, at 55.

⁸² See MODEL ALLIANCE, *supra* note 4; see also Hackman, *supra* note 21. Katrine Bregengaard, who was a model from the age of fourteen to twenty recalled avoiding drinks at castings after hearing tales about colleagues being drugged. Hackman, *supra* note 21.

⁸³ See, e.g., Kelli Ortega, Note, *Striking a Pose: Protecting the Welfare of Child Models*, 35 CARDOZO L. REV. 2535, 2538 (2014) (arguing for an interpretation of New York’s child endangerment statute that would prevent underage models from appearing in high fashion editorials and runway shows); Ziff, *supra* note 46.

⁸⁴ See Hackman, *supra* note 21 (stating that New York Fashion Week generates more than \$900 million a year for New York City alone); see generally JOINT ECON. COMM., U.S. CONG. THE ECONOMIC IMPACT OF THE FASHION INDUSTRY (Feb. 6, 2015), <https://maloney.house.gov/sites/maloney.house.gov/files/documents/The%20Economic%20Impact%20of%20the%20Fashion%20Industry%20--%20JEC%20report%20FINAL.pdf>.

models altogether in New York Fashion Week and editorial work since history has shown that fashion industry giants continue to violate child performer regulations.⁸⁵ However, the career of a model thrives in a very short time frame.⁸⁶ Models should be allowed to begin modeling in their late teens so long as they are afforded proper protection.⁸⁷ There are flaws within the fashion industry as a whole, and a ban on underage models will not remedy the abuse and exploitation that models of all ages face.

III. CHILD PERFORMERS AND THE LAW

A. Existing Legal Protections

The Fair Labor Standards Act (“FLSA”) includes regulations of employment standards for minors in the United States.⁸⁸ Child performers are exempt from the FLSA, which means that rules regarding allowable daily work times and total hours do not apply to them.⁸⁹ The child performer industry is regulated on a state-by-state basis, leading to inconsistency in child performer laws throughout the country.⁹⁰ New York and California, both hubs of the entertainment world, have passed legislation that aims to protect child performers.⁹¹ Yet, it is apparent that sometimes states do not have the children’s best interests in mind. For example, in the case of child actors, states compete with each other for film production revenue, and there is tension between a state’s interest in revenues and a state’s interest in protecting children from unfair working conditions.⁹² Child performer laws give parents a great degree of control over their child entertainers.⁹³ But parental control over child performers also poses a danger to the child performer’s best interests. Case studies show that parents, upon their child’s success, may grow greedy and

⁸⁵ See Karolina Weglarz, *Should Magazines and Modeling be Banned for Kids Under 18?*, HUFFINGTON POST (Jan. 20, 2012), http://www.huffingtonpost.ca/2012/01/18/underage-models_n_1214052.html.

⁸⁶ See PBS, *supra* note 18.

⁸⁷ Scout MacEachron, *A 14-Year-Old Model Reveals What Walking in NYFW is Really Like*, BROADLY (Sept. 18, 2015), https://broadly.vice.com/en_us/article/a-14-year-old-model-reveals-what-walking-in-nyfw-is-really-like (examining one underage model’s career as an example of proper adherence to child performer regulations, supportive parents, and a healthy balance between modeling work and teenage life).

⁸⁸ 29 U.S.C. § 212 (2017).

⁸⁹ 29 U.S.C. § 213(c)(3) (2017).

⁹⁰ Krieg, *supra* note 55, at 443.

⁹¹ Krieg, *supra* note 55, at 432.

⁹² Krieg, *supra* note 55, at 432.

⁹³ See Erica Siegel, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 442 (2000).

eventually exploit their children for money.⁹⁴ On the other hand, low-income families may not be able to support a child star's career without income generated from that career.⁹⁵ Supporting a child star's growing career may entail excessive travel expenses, and ultimately even moving expenses.⁹⁶

The pitfalls of legislation concerning child performers and child models are similar. Comparably, states may fail in safeguarding rights of underage performers.⁹⁷ For child actors, states have an interest in film production revenue, which is partially attributable to child actors.⁹⁸ For underage models, New York, for example, has a great interest in the revenue generated by New York Fashion Week and in New York City's continuing status as one of the fashion capitals of the world.⁹⁹ Child actors and entertainers are able to extend and advance their careers due to their access to union membership in the Screen Actors Guild ("SAG") or the American Federation of Television and Radio Artists ("AFTRA").¹⁰⁰ Models, however, do not have union representation, and New York only just extended its child performer protections to models in 2013.¹⁰¹ It has been suggested that advertisers using underage performers should strictly comply with child labor laws in New York, as the rules governing working conditions for underage performers are more likely to be enforced with respect to television advertising than print advertising.¹⁰² Due to the nature of the work environment, it is easier to police on-screen actors and similar performers more strictly than it is to keep tabs on print or runway models.¹⁰³

Currently, the New York regulations only cover "employees."¹⁰⁴ Thus, the regulations do not apply in this context because models are classified as independent contractors, not employees, under state law and

⁹⁴ See generally *id.* (outlining case studies of different instances where parental interference adversely affected child entertainers and athletes).

⁹⁵ Krieg, *supra* note 55, at 438.

⁹⁶ See Denise Simon, *How Much Does It Cost to Raise a Child Star?*, BACKSTAGE (Jul. 24, 2015), <http://www.backstage.com/advice-for-actors/backstage-experts/how-much-does-it-cost-raise-child-star/>.

⁹⁷ Krieg, *supra* note 55, at 432 (arguing that often times, states' interests in revenues take precedent over the need to protect child entertainers from unsafe working conditions).

⁹⁸ Krieg, *supra* note 55, at 431.

⁹⁹ See Hackman, *supra* note 21 and accompanying text.

¹⁰⁰ *Young Performers*, SCREEN ACTORS GUILD, <http://www.sagaftra.org/content/young-performers> (last accessed Mar. 14, 2017).

¹⁰¹ N.Y. Lab. Law § 150 (McKinney 2017).

¹⁰² Dayal et al., *supra* note 56, at 238.

¹⁰³ Dayal et al., *supra* note 56, at 238.

¹⁰⁴ N.Y. Lab. Law § 151 (McKinney 2017) (listing the "employment" requirements for child performers).

in most modeling agency contracts.¹⁰⁵ For this reason, models largely avoid taking legal action to enforce their rights under state regulations.¹⁰⁶ Legal recourse for workplace injustices is essentially dependent on the model's status.¹⁰⁷ Because of the ambiguity of models' status as independent contractors and the mobile nature of models' services, inconsistent industry practices fall hard on them.¹⁰⁸

B. Proposed Federal Bill: The Child Performers Protection Act of 2015

New York State Representative, Grace Meng, recently introduced the Child Performers Protection Act of 2015 to the House of Representatives.¹⁰⁹ To determine what the proposed federal bill's most successful points are, prior legislation enacted by New York State must be considered. The New York State Legislature amended New York Labor Law Section 150 to include "runway or print models" under its definition of child performers, thus including underage models under the legal safeguards afforded to other types of child performers.¹¹⁰ This law was meant to afford more protections to underage models and to create stricter rules for their employers because the industry was practically unregulated beforehand.¹¹¹ New York Labor Law Section 151 requires that in order to hire a child performer, employers must: (1) hold a child performer permit from the Department of Labor; (2) obtain written consent from the child's parents or guardians; and (3) provide evidence that the child's education is not adversely affected by their performance job.¹¹² Additionally, fifteen percent of the child's earnings must be placed in a trust account, as per the New York Department of Labor's

¹⁰⁵ See Alexandra Simmerson, Note, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models' Rights as Workers in New York City*, 22 CARDOZO J. INT'L & COMP. L. 153, 170 (2013) (explaining that fashion models in the United States are universally accepted as independent contractors without basic employment rights).

¹⁰⁶ *Id.* at 168-69 (highlighting the fact that many models avoid taking legal action to enforce their rights for fear of retaliation from their agencies due to the commonly accepted notion that models are independent contractors and thus have little recourse under the law).

¹⁰⁷ *Id.* at 170 (quoting former model, Jenna Sauers, who stated that "[m]odels are generally considered independent contractors under U.S. law, which means that many basic provisions of employment law—including minimum wage, mandatory breaks, worker's compensation for injuries on the job site, and even protection from sexual harassment—do not apply").

¹⁰⁸ See generally Ortega, *supra* note 83, at 2539-44 (detailing the different hardships underage models face).

¹⁰⁹ Child Performers Protection Act, H.R. 3383, 114th Cong. (2015).

¹¹⁰ N.Y. Lab. Law § 150(1) (2017).

¹¹¹ See Ortega, *supra* note 83, at 2546.

¹¹² N.Y. Lab. Law § 151 (McKinney 2017).

requirements.¹¹³ In practice, however, these regulations for child performers are often ignored, and modeling agencies and fashion designers go unpunished.¹¹⁴

The Child Performers Protection Act sets out to establish federal workplace safety regulations for child performers.¹¹⁵ Like New York's Labor Law Section 151, the federal bill includes underage models.¹¹⁶ Representative Meng stated that federal legislation is necessary to adequately protect underage models due to the inconsistency of differing state laws regarding child performers.¹¹⁷ With that in mind, Representative Meng and the Model Alliance continue to push for national standards in regulating child performers.¹¹⁸ Sara Ziff, founder of the Model Alliance, stated that “[w]ithout adequate safeguards, child models often stand to be exploited by adults who do not have their best interests in mind. A unified national floor of standards would protect child performers wherever they engage in work across the country.”¹¹⁹ In November 2015, the Bill was referred to the Subcommittee on Workforce Protections.¹²⁰ The federal legislation builds upon many of the objectives previously put into motion by the New York State Legislature.¹²¹

The most important inclusion of Representative Meng's proposed federal bill is that it remedies the ambiguity in models' status in the workplace.¹²² When taking into consideration common law characterizations of employees, it is apparent that models should be classified as employees rather than independent contractors.¹²³ The main

¹¹³ *Id.*

¹¹⁴ Callie Veusman, *Vogue Violates Its Own Underage Model Initiative for the Third Time*, JEZEBEL (Dec. 20, 2013), <http://jezebel.com/vogue-violates-its-own-underage-model-initiative-for-th-1487173227>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Vanessa Friedman, *Protecting Underage Models Becomes a Federal Issue*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/fashion/protecting-underage-models-becomes-a-federal-issue.html?_r=0. (“Although there are a patchwork of disparate state laws, these regulations offer inconsistent protections. That’s why we need a national standard.” (quoting Grace Meng)); *see also* Press Release, Meng Seeks to Create Protections for Child Models and Actors (Nov. 3, 2015), <https://meng.house.gov/media-center/press-releases/meng-seeks-to-create-protections-for-child-models-and-actors>.

¹¹⁸ Friedman, *supra* note 117.

¹¹⁹ Friedman, *supra* note 117.

¹²⁰ *All Actions H.R.3383 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/3383/all-actions> (last accessed Mar. 27, 2017) (noting that on November 16, 2015, the Bill was referred to the Subcommittee on Workforce Protections); *see also* Friedman, *supra* note 117.

¹²¹ *See discussion supra* Part III.A.

¹²² Child Performers Protection Act, H.R. 3383, 114th Cong. § 2(a) (2015).

¹²³ *See generally* Ariel Sodomsky, Note, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling*

issue and source of confusion is the fact that it is difficult to determine the models' employers—their agencies or the agencies' clients. The modeling industry's "multi-level" employment system between agencies, clients, and models is widely perceived as failing to create a clear employer-employee relationship under current rules and laws, which bars models from the ability to pursue workplace protection against systemic abuses.¹²⁴

Of course, there is an attractiveness to the autonomy associated with being an independent contractor due to the "phenomenon of entrepreneurial labor: the cultural quality of cool, creativity, autonomy, self-investment, compulsory networking, portfolio evaluations, international competition, and foreshortened careers."¹²⁵ Yet, models are not given a choice, regardless of the seemingly attractive aspects of being an independent contractor. In order to book jobs, models must be part of a modeling or talent agency as models are not perceived as truly professional until they achieve representation by an agency—preferably a prestigious one.¹²⁶ In reality, only the modeling agency benefits by classifying models as independent contractors. It allows them to pay workers without withholding federal, state, and social security taxes.¹²⁷ It also allows the business entity to avoid paying workers' compensation, unemployment insurance, and employment taxes.¹²⁸ Independent contractors do not receive benefits, unemployment, or protection against harassment in the workplace.¹²⁹ Sara Ziff stated, "Explicitly defining

Industry, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269 (2014) (suggesting that models be classified as independent contractors).

¹²⁴ Sara Ziff, *Op-Ed: Changes to the Law Would Stop the Exploitation of Models*, BUS. OF FASHION (Sept. 14, 2015), <http://www.businessoffashion.com/community/voices/discussions/should-the-modelling-industry-be-regulated/op-ed-changes-to-the-law-would-stop-the-exploitation-of-models>.

¹²⁵ See Gina Neff et. al., *Entrepreneurial Labor Among Cultural Producers: "Cool" Jobs in "Hot" Industries*, 15 SOC. SEMIOTICS 307, 307 (2005).

¹²⁶ See Sodomsky, *supra* note 123.

¹²⁷ Sodomsky, *supra* note 123, at 289 (citing Tracey A. Cullen, *What a Tangled Web we Weave: The Independent Contractor Snarl*, 15 N.Y. EMP. L. LETTER 1 (2008)).

¹²⁸ See Elisabeth Schiffbauer, *Walking a Fine Line: Classification of Models as Employees or Independent Contractors in the Fashion Industry*, FASHION INDUS. L. BLOG (May 28, 2015), <http://www.fashionindustrylawblog.com/blog/2015/5/28/walking-a-fine-line-classification-of-models-as-employees-or-independent-contractors-in-the-fashion-industry>.

¹²⁹ However, the mere designation of an employee as an independent contractor is not conclusive. According to the Unemployment Insurance Division of the New York State Department of Labor, "a written agreement purporting to establish a worker's employment status does not preclude examining the facts surrounding that working relationship to determine whether the worker is an employee or independent contractor." Simmerson, *supra* note 105, at 171. If models actually litigated the issue of whether they are employees or independent contractors, they may be able to make a case proving the existence of an

2017]

ON TREND

433

modeling agencies as ‘employment agencies’ could help ensure that they are properly regulated by law. In turn, this could significantly improve a model’s ability to collect payment for her work and increase the level of financial transparency in the modeling industry.”¹³⁰

The proposed bill affords protection to models whether they are classified as independent contractors or employees.¹³¹ According to Section 2 of the Bill,

The provisions of [] relating to child labor shall not apply to any child performer if employment or contracting of the child performer is in accordance with the following: [](i)(I) An infant who has not reached six months of age may be permitted to remain at the place of employment or contracting for no more than 2 hours. [](II) A child performer age six months to twenty-four months may be permitted to remain at the place of employment or contracting for no more than 4 hours a day. [](III) A child performer age 2 years to 6 years may be permitted to remain at the place of employment or contracting for no more than 6 hours a day. [](IV) A child performer age 6 years to 9 years may be permitted to remain at the place of employment or contracting for no more than 8 hours per day. [](V) A child performer age 9 years to 16 years may be permitted to remain at the place of employment or contracting for no more than 9 hours per day.¹³²

The addition of the words “or contracting” fixes the longtime issue of the barrier preventing models from enjoying the benefits of past regulations, which only applied to employees. As mentioned above, most models are classified as independent contractors in New York, and modeling agencies call themselves “management agencies” rather than employment agencies, which helps justify this classification.¹³³ Under the federal bill, the provisions expressly apply to models whether their agencies refer to them as employees or independent contractors.

Next, the federal bill addresses the pervasive issue of payment in the modeling industry. A lack of financial transparency has persisted in the modeling industry, which has resulted in wage theft as agencies fail to compensate models for their completed work.¹³⁴ Payment in trade is one of the most pervasive injustices that models face, although systematic compensation abuses in the modeling industry are not limited to payment

employer-employee relationship.

¹³⁰ Ziff, *supra* note 124. See generally Simmeron, *supra* note 105.

¹³¹ Child Performers Protection Act, H.R. 3383, 114th Cong. § 2(a) (2015) (proposing to amend § 13(c)(3) of the Fair Labor Standards Act to read, “(3)(A) The provisions of section 12 relating to child labor shall not apply to any child performer if employment or contracting of the child performer is in accordance with the following . . .”).

¹³² *Id.* § (2)(a)(3)(A) (emphasis added).

¹³³ Ziff, *supra* note 124.

¹³⁴ Ziff, *supra* note 124.

in trade.¹³⁵ Other injustices include periods of unemployment without unemployment compensation, late pay, or failure to pay for services rendered.¹³⁶ Subsection (3)(B)(iii) of the Bill addresses the problem of payment in trade.¹³⁷ This section proposes to amend the Fair Labor Standards Act to read, “An employer or contractor may not provide compensation to any child performer in any other form other than cash wages, exclusive of board, lodging, or facilities.”¹³⁸ This clause would expressly forbid the practice of paying models in trade, as designers continue to pay models in the form of clothing, merchandise, or gift cards for the designer’s clothing line. This clause is extremely important, as payment in trade is one of the most prominent injustices models face. Indeed, models and activists have been pushing for a clause like this for years.¹³⁹

Lastly, subsection (3)(B) of the Child Performer Protection Act designates noncompliance with clauses (i) through (iii) of subparagraph (3)(A) as “oppressive child labor.”¹⁴⁰ In the past, provisions like this one have not been included in child performer protection legislation.¹⁴¹ This inclusion may lead to greater adherence to the requirements listed in the Bill. Employers would face a greater risk of being penalized if their conduct violates the requirements.

IV. IMPROVING THE REFORM EFFORT

A. *Interpreting the Text of the Child Performers Protection Act: Proposed Changes*

As written, the thrust of the Child Performer Protection Act aims for more restrictions in the hours child performers may work. The regulations should focus on payment rather than work restrictions. It is

¹³⁵ Ziff, *supra* note 124; *see, e.g.*, Olivia Fleming, *Fashion Industry Initiative Cracks Down on Labels that Don’t Pay Models (and that Includes You, Marc Jacobs)*, DAILY MAIL ONLINE (Mar. 27, 2012), <http://www.dailymail.co.uk/femail/article-2120523/Fashion-industry-initiative-cracks-labels-dont-pay-models-includes-Marc-Jacobs.html>;

Lexi Nisita, *What Models Really Get Paid for NYFW (Spoiler: Not What You’d Guess)*, REFINERY29 (Feb. 19, 2013), <http://www.refinery29.com/2013/02/43169/how-much-money-do-models-make> (detailing the experience and earned wages of an anonymous model who has worked for mere exposure and was paid in trade multiple times).

¹³⁶ *See* Simmerson, *supra* note 105, at 155.

¹³⁷ Child Performers Protection Act, H.R. 3383, 114th Cong. § 2(a)(3)(A)(iii) (2015).

¹³⁸ Child Performers Protection Act, H.R. 3383, 114th Cong. § 2(a)(3)(B) (2015); *see supra* text accompanying note 132.

¹³⁹ *See generally* Sara Ziff, *Introductory Note*, MODEL ALLIANCE (Feb. 6, 2012), <http://modelalliance.org/introductory-note>.

¹⁴⁰ Child Performers Protection Act, H.R. 3383, 114th Cong. § 2(a) (2015).

¹⁴¹ *See* discussion *supra* Part III.A.

true that regulations aim to protect the health and safety of young models, but this must be reconciled with the notion that models have a right to pursue their career aspirations and earn a living. The hourly restrictions directly conflict with the structure of fashion week across the globe. Fashion week is central to a model's quest for exposure and appearing in shows is necessary to further her career.¹⁴² The typical runway production reportedly costs approximately \$200,000.¹⁴³ Realistically, the profits gained from fashion shows should be adequate to pay models for their long hours of labor. Rather than unduly restrict the hours that underage models can work, there should be a better system to maintain adequate working conditions for them and to provide them with sufficient pay.

Certain child performers are not subject to the work hour restrictions under the Child Performers Protection Act. Under subsection (3)(C), the work restrictions set forth in (3)(A) do not apply to child performers "employed in a live theatrical production, including theater, opera, and dance."¹⁴⁴ Fashion week shows can be likened to "live theatrical productions." Fashion weeks have been described as the opportunity for fashion designers to "take their creative visions to the next level, transforming runways and stages to theatrical masterpieces."¹⁴⁵ In recent seasons, the incorporation of sets, music, props, and elaborate decoration have become ubiquitous on the catwalk.¹⁴⁶ The fashion show becomes a form of narrative storytelling, creating a sense of "cohesion" between the

¹⁴² Working for exposure is not exclusive to the modeling industry. Many young workers in the fashion industry at large work long hours for little to no compensation to gain merit or future job prospects. See Ashley Mosley, *Why Unpaid Internships Are No Catwalk for the Fashion Industry*, HUFFINGTON POST (Mar. 30, 2014), http://www.huffingtonpost.com/ashley-mosley/why-unpaid-internships-ar_b_4675855.html ("Many interns don't see these unpaid internships as educational experiences. They accept that they will likely be running errands or grabbing coffee. To them, these 'experiences' are justifiable enough to go without pay. Many do not see a problem with work that does not contribute to their careers because they are working for a household name. That is, image trumps experience.").

¹⁴³ See Sky, *supra* note 75 ("The typical runway presentation at this biennial (sic) event reportedly costs around \$200,000 for a show that might last all of 20 minutes.").

¹⁴⁴ Child Performers Protection Act, H.R. 3383, 114th Cong. § 2(a)(3)(C) (2015); see *supra* text accompanying note 132.

¹⁴⁵ See Zahra Jamshed, *The Joy of Sets: A Look Back at Fashion's Most Elaborate Catwalk Shows*, CNN (Sept. 23, 2015), <http://www.cnn.com/2015/09/23/fashion/fashion-week-set-designs/>.

¹⁴⁶ See Angelo Flaccavento, *Narrative and Neorealism*, BUS. OF FASHION (Jan. 25, 2016), <http://www.businessoffashion.com/articles/fashion-show-review/narrative-and-neorealism-paris-menswear-autumn-winter-2016> ("In today's 'société du spectacle,' fashion shows increasingly resemble brutally concise theatre, sampling everything from war to the cult of the derelict.").

apparel and staging.¹⁴⁷ Fashion week, with its grand scale and pivotal role in generating revenue, happens in a seasonal cycle. For this reason, there is a virtually inevitable, reoccurring spike in demand for workers during biannual fashion weeks. Fashion industry traditions are too deeply-rooted to change in a way that spreads out the demand for workers across the year. Thus, it is a necessary evil that models, eager to gain exposure and compensation, need to endure extra hours of work during fashion weeks. Because of the brief nature of fashion week, exploitation of underage workers should not be long-lasting. In tandem with other protections, the risks of the fashion industry will be outweighed, thereby protecting underage models. Therefore, runway models should be exempt from the mandatory work hour restrictions during their participation in fashion week shows.

Additionally, the Bill needs more precise wording in certain subsections to completely protect underage models. Under subsection (z), child performers are defined as children under the age of eighteen who are “employed or contracted as an actor or performer in a motion picture or live theatrical production, or in a radio or television production, or as a model for a fashion show, showroom, or similar production or for commercial media.”¹⁴⁸ In the fashion industry, editorial shoots are known as magazine spreads, while advertising shoots are completed for the commercial gain of the designer.¹⁴⁹ In the interest of protecting models, this section should include “editorial” models who participate in photoshoots. Otherwise, employers may find a loophole in their treatment of models who are only hired for editorial photoshoots. Although the term “commercial media” is included in subsection (z), this language does not signify the inclusion of editorial models clearly enough.

B. Strengthening the Law Through Industry Changes

Legislation could be even more effective with the help of industry-wide support in the fashion industry. The modeling industry should look to the entertainment industry for guidance, as the two industries parallel each other in many ways.¹⁵⁰ For instance, in both industries, the first giant hurdle for young hopefuls is breaking into a business seemingly filled with comparable, disposable talent.¹⁵¹ Like models, many actors

¹⁴⁷ *Id.*

¹⁴⁸ Child Performers Protection Act, H.R. 3383, 114th Cong. § 2(a) (2015).

¹⁴⁹ *Advertising vs. Editorial*, FASHION PHOTOGRAPHY BLOG, <http://www.fashionphotographyblog.com/2009/12/advertising-vs-editorial/> (last accessed Jan. 27, 2017).

¹⁵⁰ See discussion *supra* Part III.A.

¹⁵¹ See discussion *supra* Part III.A.

become discouraged and leave the business after minor success. Entertainers and models often struggle to build other careers if their career is short-lived and fizzles out.¹⁵² For both models and actors, there is always the carrot dangling in front of the young artist that their big break will come soon enough. Actors aspire to be Hollywood stars just like models yearn to be high fashion supermodels.

When Congress exempted child performers from the Fair Labor Standards Act, it may have assumed that most child performers would be represented by a union in addition to being protected by state law. Hollywood unions represent exactly what Congress textually exempted from the Fair Labor Standards Act: the SAG represents actors, while the AFTRA represents other performers.¹⁵³ Actors in the United States are able to rely on the SAG or AFTRA unions for support and vigorous workplace protection. SAG-AFTRA has existed since the 1930's and continues to expand protection for media artists today.¹⁵⁴ The union negotiates wages, working conditions, and health and pension benefits for artists, as well as "preserves and expands" members' work opportunities.¹⁵⁵ Child actors are afforded both state law protection and union protection because SAG-AFTRA offers all underage performers the ability to become full-fledged members of a labor union.¹⁵⁶

This distinction between child actors and child models may reveal the reasons why fashion industry standards have not conformed to the objectives pondered by the amendment adding underage models to child performer legislation in New York. Underage models have, up until now, relied solely on state law to protect them because they do not have union backing like other child performers. In contrast to the widely unregulated fashion industry, the entertainment industry is heavily unionized.¹⁵⁷ Fashion companies and advertising agencies are often signatories to industry guild agreements.¹⁵⁸ This includes agreements with entities, such as SAG and AFTRA, especially in the marketing, advertising, and

¹⁵² See Green, *supra* note 17 ("Given the age at which models begin working, some are tempted to drop out of school to work full time.").

¹⁵³ See generally *History*, SAG-AFTRA, <http://www.sagaftra.org/history> (last accessed Mar. 14, 2017).

¹⁵⁴ *Id.*

¹⁵⁵ *Mission Statement*, SAG-AFTRA, <http://www.sagaftra.org/content/about-us> (last accessed Mar. 14, 2017).

¹⁵⁶ *For Parents*, SAG-AFTRA, <http://www.sagaftra.org/content/for-parents> (last accessed Mar. 14, 2017).

¹⁵⁷ *Guilds and Unions*, DIRS. GUILD OF AMERICA, <https://www.dga.org/Resources/Additional/Guilds-and-Unions.aspx> (last accessed Mar. 27, 2017) (listing guilds and unions related to various aspects of the entertainment industry).

¹⁵⁸ Dayal et al., *supra* note 56, at 235.

promotion contexts.¹⁵⁹ Guild agreements require that signatories hire only guild members and pay minimum fees to the member talent for their services as well as a set percentage to the guild's pension and health funds.¹⁶⁰ SAG has the right to audit signatories that it believes are under-allocating funds for commercials covered under their jurisdiction. This means that the signatories are allegedly underpaying the contributions they owe to SAG for health and pensions.¹⁶¹

If the fashion industry successfully contemplates, negotiates, and resolves union issues in the context of actors working as talent and model spokespeople, they should be able to do the same for high fashion models should they unionize. In the nineties Donna Eller created the Models Guild, which aimed to unionize models.¹⁶² However, the Models Guild never fully realized its objectives or reached its potential because modeling agencies showed resistance to the notion of unionizing models. Models themselves worried that they would be blacklisted for their union ties.¹⁶³ Scafidi of Fordham University's Fashion Law Institute stated that "[f]ounding a union makes a strong oppositional statement that scares off people . . . All of our conversations have been about how do we make change happen."¹⁶⁴ Models cannot afford to scare people away. Models are younger, less securely employed, and more interchangeable than workers in other non-arts and entertainment-related professions that unionize. Because of the surplus of models, there is the assumption that the model is always replaceable by another young hopeful. Thus, models cannot and do not take risks in an industry as notoriously fast-paced as fashion.

Fashion industry trade bodies should function as unions to fight for models' rights; however, their current lack of enforcement ability, once again, stems from laws that classify models as independent contractors.¹⁶⁵ Change in the modeling industry thus becomes dependent on corrective work done by group activism. For example, Sara Ziff, a former model, founded the Model Alliance, a nonprofit group that fights for the rights

¹⁵⁹ Dayal et al., *supra* note 56, at 235.

¹⁶⁰ Dayal et al., *supra* note 56, at 235.

¹⁶¹ Dayal et al., *supra* note 56, at 236.

¹⁶² *Our Supporters*, MODEL ALLIANCE, <http://modelalliance.org/our-supporters> (last accessed Mar. 26, 2017).

¹⁶³ Steven Greenhouse, *A New Alliance Steps up to Protect a New Generation of Models*, N.Y. TIMES (Dec. 23, 2013), <http://www.nytimes.com/2013/12/24/business/a-new-alliance-steps-up-to-protect-the-next-generation-of-models.html?pagewanted=1&ref=business&hpw>.

¹⁶⁴ *Id.*

¹⁶⁵ See discussion *supra* Part III.A.

of models in the workplace.¹⁶⁶ There are now over 400 members, and Ziff has taken on a superhero role in fighting for the rights of models.¹⁶⁷ The Model Alliance has attacked each of the glaring issues within the modeling agency: Ziff advocates for extending New York child performer rights to include underage models, fights against payment in trade during Fashion Week, and continues to flag the lack of financial transparency in modeling agencies.¹⁶⁸ The Model Alliance's success is commendable, but their reluctance to be more like a union holds them back from accomplishing profound change in the modeling industry, not only during fashion weeks but in day-to-day model castings and photoshoots. In order to establish firm, industry-wide standards, models may need to unionize.¹⁶⁹ Yet, once again proving to be a great impediment to the Model Alliance fully unionizing is current laws, which classify models as independent contractors rather than as employees.

One of the most important fashion industry organizations, the Council of Fashion Designers of America ("CFDA"), recognizes that the distinction between employee and independent contractor must be resolved for high fashion models.¹⁷⁰ The CFDA is currently working with New York State Senator, Diane J. Savino, to update New York's law to reflect the models' specific legal needs. Steven Kolb, President and Chief Executive Officer of the CFDA stated,

If you're a child actor, you work on set for a number of days or weeks — you have one employer, one job. In the instance of a model, you might have five employers on one given day during fashion week — so who is the responsible employer? Is it the designer; is it the agent? There is some confusion in the translation of how the employer is responsible for that child.¹⁷¹

Kolb's quote highlights that the central question—who should be

¹⁶⁶ See Ziff, *supra* note 139; see also Greenhouse, *supra* note 163.

¹⁶⁷ See Greenhouse, *supra* note 163.

¹⁶⁸ *Mission*, MODEL ALLIANCE, <http://modelalliance.org/mission> (last accessed Mar. 14, 2017).

¹⁶⁹ See Harriet Reuter Hapgood, *Fashion: A Model of Militancy*, INDEP. (Jan. 6, 2008), <http://www.independent.co.uk/life-style/fashion/news/fashion-a-model-of-militancy-768224.html> ("Without an independent support network, even models represented by reputable agencies are open to exploitation. Other models have attempted to set up unions in London and New York in the past, but their efforts were squashed by those in power.").

¹⁷⁰ The Council of Fashion Designers of America is an organization whose mission is to advocate for the influence and success of American Fashion Designers in the global fashion industry. See *Council of Fashion Designers of America*, BUS. OF FASHION, <https://www.businessoffashion.com/community/companies/cfda> (last accessed Mar. 14, 2017).

¹⁷¹ Kate Abnett, *New Guidelines on Models' Rights Aim to Fix Industry Wrongs*, BUS. OF FASHION (Sept. 14, 2015), <https://www.businessoffashion.com/articles/intelligence/models-rights-law-industry-education>.

considered the models' employer—must be resolved within the fashion and modeling industry. The Child Performers Protection Act of 2015 is a step in the right direction. On the opposite side of the spectrum, some fashion industry executives wholeheartedly reject the idea of legislation to improve the industry, advocating for only industry-led efforts.¹⁷²

Ultimately, the unionization argument becomes twofold: unions would function as a necessary supplement to the legislation. As the lack of change demonstrates, legislation by itself may not be enough to completely protect models in the fashion industry. Additionally, federal-level legal change will afford models the ability to develop unions. Changes to child performer legislation, such as those proposed by Representative Meng, along with the prospect of unionization, will bring about the ability to make concrete improvements, in the end making the law itself more powerful.

V. CONCLUSION

The time has come for the persisting injustices faced by underage models to finally come to an end. There are multiple avenues through which remedies may be put into action. The legislature must first and foremost expressly designate models as employees rather than leaving them in a space of ambiguity. This misclassification renders models in general—but especially underage models—without legal protection and recourse. Due to inconsistencies and discrepancies between different state legislation aimed at regulating child performers, the greatest and most effective mechanism for creating industry-wide, nationwide standards for the employment of underage models would be to enact federal legislation. New developments in the endeavor to regulate the modeling industry's treatment of underage models and to promote greater awareness of the injustices that models face promise to bring about improvement to the fashion industry as a whole. Improvements to the modeling industry may also be spearheaded by industry labor organizations, such as the Model Alliance. If models unionize in a way that mirrors performers in the entertainment industry, then their rights under state law may be further protected.

The fashion industry is a key player in the global economy and models are central to the industry's continued success. Underage models must be compensated adequately for the hard work they do—from long hours at photoshoots, to traveling across the world for fashion week

¹⁷² *See id.* (“I don't believe in legislation. Self-regulation from within the industry is what is needed. But it does not come on its own; there needs to be discussions and agreements. We need to encourage and trust the industry to be responsible.” (quoting Eva Kruse, CEO of the Danish Fashion Institute and Copenhagen Fashion Week)).

2017]

ON TREND

441

shows.