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On Trend: Continuing the Effort to Inspire Fashion Industry Reform and Protect Underage Fashion Models

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I. Introduction

Fashion law is rapidly growing as a legal discipline and 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 for federal legislation to address the systemic abuses suffered by underage models in the fashion industry. I 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 models of all ages face exploitation, and the solution lies in changes to the industry as a whole, 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 look at how other 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 in order to reach even greater protection for underage models.

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

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

II. The Fashion and Modeling Industry as an “Aesthetic” Market: The Underage Model Experience

Unbeknownst to much of the public is the fact that many of the models appearing in high fashion ads and runway shows are minors under the age of eighteen.³ The dangers of the industry, such as exploitation and sexual harassment, fall hardest on them.⁴ 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

² See ROGER TALLEY, *THE PROFESSIONAL’S GUIDE TO MODELING: A COMPREHENSIVE LOOK AT THE BUSINESS OF BEING A MODEL* 53 (2007).

³ *Industry Analysis*, THE MODEL ALLIANCE, <http://modelalliance.org/industry-analysis> (last visited Jan. 20, 2016).

⁴ 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-fashions-unhealthy-obsession-youth> (recounting how, without the Child Model Law, as an underage model Sky was “photographed nude at 16, unknowingly pimped to Wall Streeters, groped countless times,” and “forced to work 16-hour days”).

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.⁵ The business remains successful as aesthetic qualities are made meaningful, generated around commodities, and thus building their “aesthetic value.”⁶ The constantly changing qualities of style and appearance must be stabilized for a short period of time in order to generate value, and the most obvious examples of these short periods of time are the different fashion “seasons.”⁷ It follows that fashion models’ aesthetic values are also subject to constant temporal fluctuations, as the models are the vehicles through which fashion trends are communicated to the world.⁸ 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.⁹ 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 will inevitably come to the forefront.¹⁰ Therefore, the fashion industry is built upon novelty, with a fast turnover in product and labor.¹¹ Models’ visual aesthetics, which serves as their product, come in and out of fashion just like the clothing—thus there is a fast turnover in their labor as well.¹² In this way, the fashion seasons create a sense of volatility.

The prospect of success for models is very unclear. In the fashion industry, something as subjective and inherently cultural as physical appearance is commodified and sold.¹³ Those in

⁵ JOANNE ENTWISTLE, *AESTHETIC ECONOMY OF FASHION: MARKETS AND VALUE IN CLOTHING AND MODELLING* (2009).

⁶ *Id.* at 28.

⁷ *Id.* at 29.

⁸ *See generally* Entwistle, *supra* note 5.

⁹ *Id.* at 51.

¹⁰ *Id.*

¹¹ *Id.* at 54.

¹² *Id.*

¹³ *See generally*, *Fashion Industry Standards: Debate Over Model Appearance, Size*, CBS THIS MORNING (Feb. 17, 2015, 0:12 AM), <http://www.cbsnews.com/videos/fashion-industry-standards-debate-over-model-appearance-size/>

power controlling the market must project their ideas of what is beautiful onto consumers, trading and selling a specific aesthetic quality.¹⁴ Modeling agencies invest in careers they think will be marketable.¹⁵ They promote the particular looks they believe will sell. Despite this typical business structure, there is an inherent risk. This is because the agency's expertise is not always enough to predict the outcome of their investment in a young model.¹⁶ Fashion model careers are notoriously short-lived.¹⁷ 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. If they do not succeed, their career may be over sooner than they expected.¹⁸

Economic success depends on how much exposure models are able to obtain.¹⁹ 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.²⁰ 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.²¹ Typically, during this time models will—

(scrutinizing the modeling industry and unrealistic beauty standards presented to women); *see also* Entwistle, *supra* note 5 (explaining how aesthetic value is generated in the fashion industry).

¹⁴ Entwistle, *supra* note 5, at 51.

¹⁵ *Id.*

¹⁶ *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. However, extenuating factors come into play—not only the ever-changing trends, but also how the model interacts with the client and competition with other models hopeful to get the job.

¹⁷ *Infographic: The International Model Supply Chain*, PBS, <http://www.pbs.org/pov/girlmodel/infographic-model-fashion-industry/> (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>.

¹⁸ *See* Ciancio, *supra* note 17 (demonstrating how most of the models walking in fashion week are already preparing for alternative future careers, knowing that most modeling careers are short-term).

¹⁹ *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>.

²⁰ *Id.*

²¹ *Id.*

without pay—attend castings, clothing fittings, and parties.²² At fashion shows, they tend to earn between no cash at worst and between \$2,500 to \$5,000 at best.²³ All too often, models leave New York Fashion Week in debt.²⁴ It may seem unfathomable to an outsider that models would go through all this financial trouble just to appear in a fashion week. The fact is that fashion weeks provide the exposure that could lead to major designer and editorial campaigns for models hoping to jumpstart their careers.²⁵ Thus, these models actually take a risk in 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.²⁶ 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 to the model, but also dependent on processes and variables out of her control.²⁷ Some bookers have stated they hire models who embody some kind of “striking” or “ethereal” quality, rather than conventional beauty.²⁸ 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.²⁹ This is why models present themselves to modeling agencies and bookers in droves,

²² *Id.*; see also Entwistle, *supra* note 5, at 55.

²³ See Hackman, *supra* note 19.

²⁴ *Id.*

²⁵ *Id.* (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 how the exposure led them to walk for some of the most prominent designers such as Prada, Louis Vuitton, and Proenza Schouler).

²⁶ “New faces” is a term agencies use in order to differentiate new recruits to their agencies from past season's models. See NEWfaces, MODELS, <https://models.com/newfaces/> (last visited Feb. 20, 2016).

²⁷ See Entwistle, *supra* note 5, at 58.

²⁸ *Id.*

²⁹ See Entwistle, *supra* note 5, at 60.

hopeful that they have something to offer.³⁰ The nature of the industry is that faces are disposable, as new fresh faces enter the scene every season. Models themselves become disposable to the agencies managing them.³¹ Because no education, training, or work experience is necessary to enter the modeling industry, there is a disproportionately large number of applicants competing for few job openings.³²

Additionally, the modeling industry creates geographic restraints, despite the global market for models.³³ More and more 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.³⁴ The modeling industry is simultaneously global and local. Fashion modeling jobs are located in major cities, each with its own fashion week.³⁵ The four locations deemed most important are New York, London, Paris, and Milan.³⁶ Other cities have followed suit in developing their own notable fashion weeks: Miami, Copenhagen, Sydney, Madrid, and Shanghai are examples.³⁷ Models frequently travel for work, but their work is also stagnant within the local economy of these certain cities.³⁸ The very survival of modeling agencies depends upon building close institutional and social relationships with fashion houses within the city, which serve as the modeling agencies'

³⁰ See Green, *supra* note 16 (advising models to go on as many go-sees as they can in order to increase their visibility, and to be prepared to face rejection).

³¹ 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.").

³² See generally Occupational Handbook, 2016-17 Ed.: Models, Bureau of Labor Statistics, U.S. DEPARTMENT OF LABOR, available at <http://www.bls.gov/ooh/sales/models.htm#tab-6>.

³³ See Entwistle, *supra* note 5, at 53.

³⁴ *Id.*

³⁵ See generally, *Calendar*, MERCEDES-BENZ FASHION WEEK, <http://mbfashionweek.com/calendar> (last visited Mar. 20, 2016).

³⁶ *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").

³⁷ See Entwistle, *supra* note 5, at 54.

³⁸ *Id.*

clients.³⁹ 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.⁴⁰ Additionally, modeling agencies send the model's portfolio book to clients overseas in order to try to get their foot in the door to fashion markets abroad.⁴¹ As models gain experience in their home city, often times their career comes to a plateau. In order to gain momentum once again, agencies will actually need to "ship off" the model to another market across countries or continents.⁴² In this way, the modeling industry has a local character with a global reach, and models have little to no choice but to stay or move pursuant to their agencies' directions.⁴³

B. Youth as a Point of Vulnerability

The years have shown that models are most desirable as potential workers when they are at a young age. The fashion industry has convinced consumers that clothes look better on thin, tall people.⁴⁴ Teenagers tend to be more naturally thin than young adult women, as their bodies have not fully matured.⁴⁵ Because thinness is the beauty ideal in our consumer culture, the fashion industry perpetuates that norm by hiring underage models.⁴⁶ The models' youth is repeatedly manipulated to subordinate them into a space of vulnerability, as the girls are

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* See Hackman, *supra* note 19.

⁴³ See Entwistle, *supra* note 5, at 54..

⁴⁴ 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/>.

⁴⁵ 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").

⁴⁶ See *id.* (explaining how underage models are not good for the greater public when children are representing the feminine ideal of beauty for women).

controlled by their agencies and fashion photographers.⁴⁷ After a certain age, the model career comes to a halt.⁴⁸

Statistics demonstrate the ways in which youth often renders these 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.”⁴⁹ The IDC began investigation because underage models were not receiving the protections granted to other types of child performers, such as stage and film actors.⁵⁰ It conducted a survey wherein it determined that only 29% of models experiencing some form of abuse in the workplace were comfortable with reporting it to their modeling agency, due to fear of retribution from their agency.⁵¹ Since adult models face such reluctance and unease, underage models are likely to have even greater fears of retaliation from their agencies.⁵²

Youth becomes a vulnerable point for underage models during contract negotiation as well. Under the common law, a minor employed as a performer may disaffirm their talent agreements once reaching majority.⁵³ In some jurisdictions, notably New York, if the parties have had the agreement approved by the New York Supreme Court or New York Surrogate's

⁴⁷ *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.

⁴⁸ *See* Ciancio, *supra* note 18, and accompanying text.

⁴⁹ N.Y. STATE INDEPENDENT DEMOCRATIC CONFERENCE, NEW YORK’S MODELING CRISIS: THE IMPORTANCE OF PROVIDING LEGAL PROTECTIONS FOR CHILD MODELS 1 (2013) (stating that “in 2011, the fashion industry employed 165,000 people, generated \$1.7 billion in tax revenue, and \$55 billion in sales”).

⁵⁰ *Id.*

⁵¹ *Id.* at 7.

⁵² *See* THE MODEL ALLIANCE, *supra* note 3. 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.

⁵³ 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).

Court, it may not later be disaffirmed.⁵⁴ However, seeking court approval of contracts for minors proves to be an extra process that some consider futile.⁵⁵ This disaffirming process is one that underage models typically avoid, in order to maintain good working relationships with their agencies.⁵⁶ Upon signing with an agency, underage models often have to sign nearly unconscionable agreements that are difficult to nullify.⁵⁷ The binding relationship between models and their agencies has been likened to “indentured servitude,” as models accrue thousands in debt within their agencies.⁵⁸ Agencies pay for models’ travel, living, and casting expenses at first, and the models’ debt adds up.⁵⁹ The debt eventually turns into a form of leverage for the agencies.⁶⁰ Models are essentially forced into completing assignments that they do not wish to undertake— similar to indentured servitude.⁶¹ Additionally, modeling agency contracts have continued to classify models as independent contractors, while their true status resembles more of an employer-employee relationship with the agencies. This creates reoccurring problems regarding models’ rights in regards to payment and workplace conditions.⁶²

Modeling agents are able to gain even more leverage on aspiring underage models using a hypothetical currency of fame. The promise of fame, unsurprisingly, is often enough to lead a

⁵⁴ Ashima Dayal, Vejay Lalla, & William Jelinek, *Marketing, Advertising, and Promotion*, in *FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS* 221, 238 (Guillermo C. Jiminez & Barbara Kolsun eds., 2010).

⁵⁵ *Id.* The authors describe the court approval process “cumbersome, time-consuming, and expensive, and is by no means guaranteed.” The author suggests that advertisers consider hiring young-looking models rather than actual minors, in order to dodge the risk of minors disaffirming their contracts and ultimately forcing advertisers to end advertising campaigns featuring the model.

⁵⁶ *Id.*

⁵⁷ *See Sky*, *supra* note 31 (explaining how models are controlled by their agencies and “forced to sign multi-year, one-sided contracts without the ability to opt out if the relationship goes south”).

⁵⁸ *See Hackman*, *supra* note 19.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See infra* Part III(B) for a more detailed discussion regarding models’ status as independent contractors.

young party to a contract to sign their rights away.⁶³ Studies show that people are easily swayed by the prospect of fame, as they find fame even more desirable than wealth.⁶⁴ In today's social media age, the perks to being a famous model are observable simply by following supermodels on Instagram, Twitter, and Snapchat.⁶⁵ Many of today's supermodels have significant followings on social media.⁶⁶ It has become widely known that some of the most successful models can make thousands of dollars for a single post on Facebook, Twitter, or Instagram.⁶⁷ 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.⁶⁸ The fashion and modeling industries seem to exploit the status of being a model as an incentive to completing the labor. The prestige of being a high fashion model may be another reason why these models accept these kinds of labor conditions.⁶⁹ The reward comes not from the salary, but from the status as a product of luxury and fame.

⁶³ See Yalda T. Uhls, *Kids Want Fame More Than Anything*, THE HUFFINGTON POST (Jan. 19, 2012), http://www.huffingtonpost.com/yalda-t-uhls/kids-want-fame_b_1201935.html.

⁶⁴ *Id.*; 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>.

⁶⁵ Tracy Lomerantz Lester, *It Pays to Be Social*, CR FASHION BOOK, <http://www.crfashionbook.com/book/it-pays-to-be-social/> (last visited Mar. 20, 2016) (detailing how popular models create lasting monetary and social value by building an 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, with behind-the-scenes short video footage of fashion houses, models, influencers, and stylists.

⁶⁶ See Brooke Shunatona, *You Won't Believe How Much Kendall Jenner and Gigi Hadid Make for a Single Post 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 how many followers a model has is now a crucial factor in how likely a model is to be hired).

⁶⁷ *Id.* (noting that top supermodels can make up to six figures for a post on Instagram); see also Lester, *supra* note 65.

⁶⁸ See Hackman, *supra* note 19.

⁶⁹ *Id.*

Despite the passage of remedial state legislation, there is evidence that some of the highest names in fashion continue to employ underage models and pay models “in trade.”⁷⁰ Recent editorials and Fashion Weeks demonstrate that the regulations have not substantially impacted the industry for the better.⁷¹ It has been over a year since legislation went into effect, and there are still underage models opening some of the biggest fashion shows in 2015.⁷² One model stated she worked from 8AM to 8PM on most days during New York Fashion Week, Spring 2015 and received no pay—working pro bono or for trade.⁷³ This inconsistency and lack of change in state legislation demands that federal action be initiated in order to protect all child performers, especially underage models.

The ideal modeling career appears to glitter with luxury and glamour. The reality of the job entails long hours and low pay, with no job security for the majority of professional models. Paradoxically, culturally desirable jobs bring lowered expectations of economic stability.⁷⁴ Models must do all they can in order to gain some sort of notoriety and stand out from the rest, and so they go beyond the castings and go-sees provided by modeling agencies.⁷⁵ Some must become entrepreneurs and managers of themselves.⁷⁶ The entrepreneurial work of fashion models includes showing up to social and cultural activities and events outside of work, as a way

⁷⁰ 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.”

⁷¹ 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.

⁷² *Id.*

⁷³ Jennifer Sky, *Models of the World, Unite!*, NEW REPUBLIC (Mar. 5, 2015), <http://www.newrepublic.com/article/121223/fashion-pays-most-models-terribly-if-all-they-should-organize>.

⁷⁴ Entwistle, *supra* note 5, at 55.

⁷⁵ “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 MAG., <http://www.seventeen.com/fashion/news/a16797/tyra-banks-modeling-tips/> (last visited Jan. 21, 2016).

⁷⁶ See Lester, *supra* note 65.

of doing business.⁷⁷ This blurred line between work and play includes “compulsory ‘schmoozing’ or socializing within the industry after the workday.”⁷⁸ This kind of environment is especially dangerous for underage models, exposed to alcohol and the partying scene from a young age.⁷⁹

Some have gone as far as to propose a complete ban on underage models.⁸⁰ However, a ban on underage models does not further the government’s interest in protecting underage models while simultaneously utilizing the fashion industry as an important factor of the economy.⁸¹ Some critics advise designers to refuse underage models altogether in New York Fashion Week and editorial work, since time has shown that fashion industry giants continue to violate child performer regulations.⁸² However, the career of a model thrives in a very short time frame.⁸³ Models should be allowed to begin in their late teens, as long as they are afforded proper protection.⁸⁴ 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.

⁷⁷ See Entwistle, *supra* note 5, at 55.

⁷⁸ *Id.*

⁷⁹ See THE MODEL ALLIANCE, *supra* note 3; see also Hackman, *supra* note 19. 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.

⁸⁰ 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); *Opinion: Why Children Shouldn’t Be Fashion Models*, CNN (Dec. 4, 2015), <http://www.cnn.com/2015/10/28/opinions/underage-fashion-models-concerns/>.

⁸¹ See Hackman, *supra* note 19 (stating that New York Fashion Week generates more than \$900 million a year for New York City alone); see generally Joint Economic Committee, *The Economic Impact of the Fashion Industry* (Feb. 6, 2015) available at <https://maloney.house.gov/sites/maloney.house.gov/files/documents/The%20Economic%20Impact%20of%20the%20Fashion%20Industry%20--%20JEC%20report%20FINAL.pdf>.

⁸² See Karolina Weglarz, *Should Magazines and Modeling Be Banned for Kids Under 18?*, THE HUFFINGTON POST (Jan. 20, 2012), http://www.huffingtonpost.ca/2012/01/18/underage-models_n_1214052.html.

⁸³ See PBS, *supra* note 17.

⁸⁴ Scout MacEachron, *A 14-Year-Old Model Reveals What Walking in NYFW Is Really Like*, BROADLY (Sep. 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).

III. Child Performers and the Law

A. Existing Legal Protections

The Fair Labor Standards Act includes regulation of employment standards for minors in the United States.⁸⁵ Child performers are exempt from the Fair Labor Standards Act, which means that the rules regarding the total allowable number of work hours in one day and allowed times of day to work do not apply to these children.⁸⁶ Regulation is enacted on a state-by-state basis, which has led to inconsistency in child performer laws.⁸⁷ New York and California, both hubs of the entertainment world, have passed legislation that aims to protect child performers, but policy is not uniform throughout the United States.⁸⁸ In practice, it is apparent that sometimes states do not have the children's best interests in mind. For example, in the case of child actors, several states compete with each other for film production, and there is tension between state interest in revenues and state interest in protecting children from unfair working conditions.⁸⁹ Child performer laws leave parents to have a great degree of control over their child entertainers.⁹⁰ This also poses a danger to the child performer's best interests—case studies have shown that parents, upon their child's success, may grow greedy and end up exploiting their children for money.⁹¹ On the other hand, low-income families may not be able to support a child star's career without income generated from that career.⁹² Supporting a child

⁸⁵ 29 U.S.C. § 212.

⁸⁶ 29 U.S.C. § 213(c)(3).

⁸⁷ Krieg, *supra* note 53, at 443.

⁸⁸ *Id.* at 432.

⁸⁹ *Id.*

⁹⁰ See Erica Siegel, Note, *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).

⁹¹ See generally Siegel, *supra* note 90 (outlining case studies of different instances wherein parental interference adversely affected child entertainers and athletes).

⁹² Krieg, *supra* note 53, at 438.

star's growing career may entail excessive travel expenses, and ultimately even moving expenses.⁹³

The pitfalls of child performer and child model legislation are similar. In comparable ways, states may fail to completely protect the interest in safeguarding rights of underage performers.⁹⁴ For child actors, states have an interest in film production revenue.⁹⁵ In regards to underage models, New York, for example, has a great interest in the revenue generated by New York Fashion Week along with New York City's continuing status as one of the fashion capitals of the world.⁹⁶ However, 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").⁹⁷ Models do not have union representation, and New York only just extended its child performer protections to models in 2013.⁹⁸ It has been suggested that advertisers using underage performers should strictly comply with child labor laws in New York in particular, as the rules governing working conditions for underage performers are more likely to be enforced with respect to television advertising than print advertising.⁹⁹ 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.¹⁰⁰

Currently, the New York regulations only cover "employees."¹⁰¹ Thus, regulations are not put into effect because models are classified as independent contractors, not employees,

⁹³ 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/>.

⁹⁴ Krieg, *supra* note 53 at 432 (arguing that often times, states' interests in revenues take precedent over the need to protect child entertainers from unsafe working conditions).

⁹⁵ *Id.* at 431.

⁹⁶ See Hackman, *supra* note 19, and accompanying text.

⁹⁷ *Young Performers*, SAG-AFTRA, <http://www.sagaftra.org/content/young-performers> (last visited Mar. 20, 2016).

⁹⁸ N.Y. Lab. Law § 150 (McKinney 2014).

⁹⁹ Dayal, Lalla, & Jelinek, *supra* note 54 at 238.

¹⁰⁰ *Id.*

¹⁰¹ N.Y. Lab. Law § 151 (listing the "employment" requirements for child performers).

under state law and in most modeling agency contracts.¹⁰² For that reason, models largely avoid taking legal action to enforce their rights under the regulations.¹⁰³ Legal recourse for workplace injustices is essentially dependent on the model's status.¹⁰⁴ Because of the ambiguity of models' status as independent contractors and the mobile nature of model's services, inconsistent industry practices fall especially hard upon them.¹⁰⁵

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.¹⁰⁶ To determine what the proposed federal bill's most successful points are, it is instructive to consider prior legislation enacted by New York State. New York State Legislature amended New York Labor Law § 150 to include “runway or print models” under its definition of child performers, thus including underage models within the safeguards afforded to other types of child performers.¹⁰⁷ This was in an effort to afford more protection to underage models, and create stricter rules for their employers to follow, as the industry was practically unregulated beforehand.¹⁰⁸ New York Labor Law § 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

¹⁰² 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).

¹⁰³ *Id.* at 168-9 (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).

¹⁰⁴ *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.”).

¹⁰⁵ See generally Ortega, *supra* note 80, at 2539-44 (detailing the different hardships underage models face).

¹⁰⁶ Child Performers Protection Act, H.R.3383, 114th Cong. (2015).

¹⁰⁷ N.Y. Lab. Law § 150 (McKinney 2014).

¹⁰⁸ See Ortega, *supra* note 80, at 2546.

guardians; and (3) provide evidence that the child’s education is not adversely affected by their performance job.¹⁰⁹ Additionally, 15% of the child’s earnings must be placed in a trust account, as per the New York Department of Labor’s requirements.¹¹⁰ In practice, however, these regulations for child performers are often ignored, and modeling agencies and fashion designers go unpunished.¹¹¹

The Child Performers Protection Act sets out to establish federal workplace safety regulations for child performers.¹¹² Like New York’s child performer legislation, the federal bill includes underage models.¹¹³ Representative Meng stated that federal legislation was necessary in order to adequately protect underage models due to the inconsistency of differing state laws regarding child performers.¹¹⁴ With that in mind, Representative Meng and the Model Alliance are pushing for national standards in regulating child performers. 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.”¹¹⁵ The bill is currently up for deliberation with the Committee on Education and the Work Force.¹¹⁶

¹⁰⁹ N.Y. Lab. Law § 151 (McKinney 2014).

¹¹⁰ *Id.*

¹¹¹ 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>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 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. (quoting Grace Meng, “Although there are a patchwork of disparate state laws, these regulations offer inconsistent protections. That’s why we need a national standard.”); *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>.

¹¹⁵ Friedman, *supra* note 114.

¹¹⁶ *Id.*

The federal legislation builds upon many of the objectives previously put into motion by New York state legislature.¹¹⁷

The most important inclusion of Representative Meng’s proposed federal bill is that it remedies the ambiguity in models’ status in the workplace.¹¹⁸ When taking into consideration common law characterizations of employees, it is apparent that models should be classified as employees rather than independent contractors.¹¹⁹ The main issue and source of confusion is the fact that it is difficult to determine to whom models are employed—their agency or the agency’s 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.¹²⁰

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.”¹²¹ 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

¹¹⁷ See discussion, *supra* Part III(A).

¹¹⁸ Child Performers Protection Act, H.R.3383, 114th Cong. § 2(a) (2015).

¹¹⁹ See Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269 (2014).

¹²⁰ 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/oped-changes-to-the-law-would-stop-the-exploitation-of-models>.

¹²¹ See Gina Neff et. al., *Entrepreneurial Labor Among Cultural Producers: “Cool” Jobs in “Hot” Industries*, 15 SOC. SEMIOTICS 307 (2005).

one.¹²² 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. It also allows the business entity to avoid paying workers' compensation, unemployment insurance, and employment taxes.¹²³ Independent contractors do not receive benefits, unemployment, or protection against harassment in the workplace.¹²⁴ Sara Ziff stated, “Explicitly defining 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 modelling industry.”¹²⁵

The proposed bill affords protection to models whether they are classified as independent contractors or employees.¹²⁶ The bill states under Section 2 that the provisions “relating to child labor shall not apply to any child performer if employment *or contracting* of the child performer...” complies with subsections (i) (emphasis added).¹²⁷ 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, while modeling agencies call themselves

¹²² See Sodomsky, *supra* note 119.

¹²³ See Elisabeth Schiffbauer, *Walking a Fine Line: Classification of Models as Employees or Independent Contractors in the Fashion Industry*, FASHION INDUSTRY LAW 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>.

¹²⁴ 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. It states that “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.” 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 employer-employee relationship.

¹²⁵ See Ziff, *supra* note 120.

¹²⁶ 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:”).

¹²⁷ *Id.*

“management agencies” rather than employment agencies.¹²⁸ 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 results in wage theft as agencies fail to compensate models for their completed work.¹²⁹ 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 in trade.¹³⁰ Others include periods of unemployment without unemployment compensation, late pay, or failure to pay for services rendered.¹³¹ Subsection (iii) addresses the problem of payment in trade. This section proposes to amend the Fair Labor Standards Act to read “(iii) 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.”¹³² 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.¹³³

¹²⁸ Ziff, *supra* note 120.

¹²⁹ *Id.*

¹³⁰ *Id.*; 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).

¹³¹ See Simmerson, *supra* note 102, at 155.

¹³² Child Performers Protection Act, H.R.3383, 114th Cong. § 2(a) (2015).

¹³³ See generally, Sara Ziff, *Introductory Note*, THE MODEL ALLIANCE, <http://modelalliance.org/introductory-note> (last visited Mar. 20, 2016).

Lastly, subsection (B) designates noncompliance with clauses (1) through (iii) of subparagraph (A) as “oppressive child labor.”¹³⁴ In the past, provisions like this one have not been included in child performer protection legislation.¹³⁵ This inclusion may lead to greater adherence to the requirements listed in the bill. Employers will face a greater risk of being penalized if their conduct is in violation of 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 bill aims for more restrictions in the hours child performers may work. The regulations should place focus on payment rather than work restrictions. It is 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. As fashion week is central to a model’s quest for exposure, appearing in shows is necessary in order to further their careers.¹³⁶ The typical runway production reportedly costs approximately \$200,000.¹³⁷ Realistically speaking, 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, along with sufficient pay.

¹³⁴ Child Performers Protection Act, H.R.3383, 114th Cong. § 2(a) (2015).

¹³⁵ See discussion *supra* Part III(A)

¹³⁶ 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 in order to gain merit or future job prospects.

¹³⁷ See Sky, *supra* note 73 (“The typical runway presentation at this biennial(sic) event reportedly costs around \$200,000 for a show that might last all of 20 minutes.”).

Certain child performers are not subject to the work hour restrictions under the Child Performers Protection Act. Under subsection (C), the work restrictions set forth do not apply to child performers “employed in a live theatrical production, including theater, opera, and dance.”¹³⁸ 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.”¹³⁹ In recent seasons, the incorporation of sets, music, props, and elaborate decoration has become ubiquitous on the catwalk.¹⁴⁰ The fashion show becomes a form of narrative storytelling, creating a sense of “cohesion” between the apparel and staging.¹⁴¹ The scale of fashion week and its pivotal nature 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 ingrained to be changed in order to spread out the demand for workers across the year. Thus, it is a necessary evil that models—eager to gain exposure and compensation—will need to endure extra hours of work during fashion weeks, these relatively brief biannual periods. 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, keeping the underage models safe. Therefore, runway models should be exempt from the mandatory work hour restrictions during their participation in fashion week shows.

¹³⁸ Child Performers Protection Act, H.R.3383, 114th Cong. § 2(a) (2015).

¹³⁹ 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/>.

¹⁴⁰ 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.”).

¹⁴¹ *Id.*

Additionally, the bill needs more precise wording in certain subsections in order to completely protect underage models. Under subsection (z), child performers are defined as children under age eighteen “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.”¹⁴² In the fashion industry, editorial shoots are known as magazine spreads, while advertising shoots are completed for the commercial gain of the designer.¹⁴³ In the interest of protecting models, this section should include “editorial” models doing photo-shoots. Otherwise, employers may find themselves a loophole in their treatment of models who are only hired for editorial photo-shoots. Although the 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 fashion industry-wide support. The modeling industry should take example from the entertainment industry, as they share many parallels.¹⁴⁴ In both industries, the first giant hurdle for young hopefuls is the act of breaking into a business seemingly filled with comparable, disposable talent.¹⁴⁵ Many actors become discouraged and leave the business after minor success, much like models. Entertainers and models often struggle to build other careers after their short-lived careers fizzle out.¹⁴⁶ For both models and actors, there is always the carrot dangling in front of the young artist that their big

¹⁴² Child Performers Protection Act, H.R.3383, 114th Cong. § 2(a) (2015).

¹⁴³ *Advertising vs. Editorial*, FASHION PHOTOGRAPHY BLOG, <http://www.fashionphotographyblog.com/2009/12/advertising-vs-editorial/> (last visited Jan. 28, 2016).

¹⁴⁴ See discussion *supra* Part III(A).

¹⁴⁵ *Id.*

¹⁴⁶ See Green, *supra* note 16 (“Given the age at which models begin working, some are tempted to drop out of school to work full time.”).

break will come soon enough. Actors aspire to be Hollywood stars just like models look up to 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.¹⁴⁷ Actors in the U.S. 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.¹⁴⁸ The union negotiates wages, working conditions, and health and pension benefits for artists, and “preserves and expands” members’ work opportunities.¹⁴⁹ Child actors are afforded both state law protection and union protection, as SAG-AFTRA offers all underage performers the ability to become full-fledged members of a labor union.¹⁵⁰

This distinction between child actors and child models may unveil 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, as they do not have union backing like other child performers. In contrast to the widely unregulated fashion industry, the entertainment industry is heavily unionized. Fashion companies and advertising agencies are often signatories to industry guild agreements.¹⁵¹ This includes agreements with entities such as SAG and

¹⁴⁷ See generally, *History*, SAG-AFTRA, <http://www.sagaftra.org/history> (last visited Jan. 28, 2016).

¹⁴⁸ *Id.*

¹⁴⁹ *Mission Statement*, SAG-AFTRA, <http://www.sagaftra.org/content/about-us> (last visited Jan. 28, 2016).

¹⁵⁰ *For Parents*, SAG-AFTRA, <http://www.sagaftra.org/content/for-parents> (last visited Jan. 28, 2016).

¹⁵¹ Dayal, Lalla, & Jelinek, *supra* note 54 at 235.

AFTRA, especially in the marketing, advertising, and promotion contexts.¹⁵² 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.¹⁵³ SAG has the right to audit signatories that it believes is under-allocating funds for commercials covered under their jurisdiction, which means they are allegedly underpaying the contributions they owe to SAG for health and pensions.¹⁵⁴

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 1990's Donna Eller created the Models Guild, which aimed to unionize models. However, it never got to fully realize its objectives—modeling agencies showed resistance to the notion of unionizing models. Models themselves worried that they would be blacklisted for their union ties.¹⁵⁵ 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.”¹⁵⁶ Models cannot afford to scare people off. 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.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Dayal, Lalla, & Jelinek, *supra* note 54 at 236.

¹⁵⁵ 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&rref=business&hpw>.

¹⁵⁶ *Id.*

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.¹⁵⁷ Change in the modeling industry thus becomes dependent on corrective work done by group activism. Sara Ziff, a former model, founded the Model Alliance, a nonprofit fighting for the rights of models in the workplace.¹⁵⁸ There are now over 400 members, and Ziff has taken on a superhero role in fighting for the rights of models.¹⁵⁹ The nonprofit has attacked each of the glaring issues within the modeling agency: Ziff advocated 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.¹⁶⁰ The Model Alliance's success is commendable, but their reluctance to be more like a union may actually hold them back from accomplishing profound change in the modeling industry—not only during fashion weeks, but from day-to-day model castings and photo-shoots. In order to establish firm, industry-wide standards, models may need to unionize.¹⁶¹ Yet, once again proving to be a great impediment, the current laws which classify models as independent contractors rather than employees prevents the Model Alliance from fully unionizing.

One of the most important fashion industry organizations, the Council of Fashion Designers of America ("CFDA"), recognizes that the distinction between employee and

¹⁵⁷ See discussion *supra* Part III(A).

¹⁵⁸ See Ziff, *supra* note 133; see also Greenhouse, *supra* note 155.

¹⁵⁹ See Greenhouse, *supra* note 155.

¹⁶⁰ *Mission*, THE MODEL ALLIANCE, <http://modelalliance.org/mission> (last visited Mar. 20, 2016).

¹⁶¹ See Harriet Reuter Hapgood, *Fashion: A Model of Militancy*, *The Independent* (Jan. 5, 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.").

independent contractor must be resolved for high fashion models.¹⁶² 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.¹⁶³

His quote highlights the fact that this is truly the central question that 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 for change.¹⁶⁴

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

¹⁶² 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.

¹⁶³ Kate Abnett, *New Guidelines on Models’ Rights Aim to Fix Industry Wrongs*, BUS. OF FASHION (Sept. 14, 2015), <http://www.businessoffashion.com/articles/intelligence/models-rights-law-industry-education>.

¹⁶⁴ *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,” stated Eva Kruse, chief executive officer of the Danish Fashion Institute and Copenhagen Fashion Week.

unionization, will bring about the ability to make concrete improvements, in the end making the law itself more powerful.

V. Conclusion

The time has arrived 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 inconsistency and discrepancy 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 the enactment of federal legislation. New developments in the endeavor to regulate the modeling industry’s treatment of underage models, along with a greater awareness of the injustices they face promises 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. However, if models were able to unionize in a way that mirrors performers in the entertainment industry, their rights under state law may be further protected.

The fashion industry is a key player in the global economy. Models running the industry are central to the industry’s continued success. Underage models must be compensated adequately for the hard work they complete—from long hours at photo-shoots, to traveling across the world for fashion week shows.