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ARE CHILDREN WHO APPEAR ON REALITY TELEVISION ADEQUATELY PROTECTED BY FEDERAL AND STATE LAW?

Jessica Rey

I. Introduction

Reality television has become an unstoppable phenomenon in the entertainment industry and now accounts for about 41 percent of Hollywood production.¹ As a genre, reality television involves ordinary individuals (although some would argue that such individuals are anything but “ordinary”) interacting on camera without scripted dialogue.² Although the genre has had roots in the past, such as in 1973 when *An American Family* was aired on PBS and documented the daily life of a “typical” family, the first show that was widely recognized as reality television in the modern sense was MTV’s *The Real World*, which aired in 1992 and filmed the interactions of various strangers forced to live under one roof.³ Reality television however, did not gain commercial success until the year 2000 with the premiere of the show *Survivor*.⁴ The show was immensely popular and “served as a catalyst for the modern-day reality television boom, and since 2000, reality-based programming has ‘flooded the airwaves.’”⁵ Producers have since become extremely attracted to this form of entertainment media due to its low production costs, which can be as little as one-third the cost of producing a scripted television show.⁶ Fortunately for producers, as the number of reality shows continues to rise, it seems that American viewers cannot get enough of the genre.

¹ Adam P. Greenberg, *Reality’s Kids: Are Children Who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act?*, 82 S. CAL. L. REV. 595, 602 (2009).

² *Id.* at 599.

³ *Id.* at 601.

⁴ *Id.* at 600.

⁵ *Id.*

⁶ Courtney Glickman, *Jon & Kate Plus . . . Child Entertainment Labor Law Complaints*, 32 Whittier L. Rev. 147, 148 (2010).

One continuing trend on reality television is the appearance of children, which presents concerns regarding their welfare due to the risks and exploitation they may face.⁷ Popular shows have included *Kid Nation*, *Jon & Kat Plus 8*, *Dance Moms* and *Honey Boo Boo*. These concerns are particularly relevant due to the vulnerability that accompanies childhood⁸ and because children do not understand the potential negative effects of participating in reality television and are therefore not capable of making informed voluntary decisions before participating.⁹ Furthermore, although it is presumed that parents will protect their children's best interests, the huge tendency of reality television to create fame and fortune may blind parents and lead to children's exploitation.¹⁰

This article addresses the child welfare concerns facing children participating in reality television, considers whether such children are adequately protected by current federal and state law, and proposes a new federal standard regulating their participation. Section II discusses the concerns associated with children's participation in reality television, including their vulnerability and the potential for exploitation and negative psychological effects. Section III presents an overview of the Fair Labor Standards Act ("FLSA"), the federal law currently regulating child labor, including its prohibition against "oppressive child labor," as well as the "Shirley Temple Act" exempting child actors and performers from its provisions. Section IV turns to state laws regulating child labor in the entertainment industry, focusing on the minimal protections provided by most and the huge disparity between the laws afforded by each state. State laws of California and New York are specifically analyzed, as they provide the most

⁷ Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA's Child Labor Provisions and Children on Reality Television*, 17 U.C.L.A. ENT. L. REV. 39, 45 (2010).

⁸ Dayna B. Royal, *Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming*, 43 Akron L. Rev. 435, 450 (2010).

⁹ Podlas, *supra* note 7.

¹⁰ *Id.*

stringent protections due to the prevalence of the entertainment industry in these states. Section V highlights the need for a uniform federal statute specifically regulating children's participation in reality television and proposes specific laws modeled after California and New York statutes. Section VI concludes.

II. Welfare of Children on Reality Television

Reality television puts children under a microscope, stripping them of their privacy when they are most vulnerable and often highlighting their most emotional and worst childhood moments for the sake of ratings and profit.¹¹ Although adults on reality television may be in a similar situation, they, unlike children, have the ability to make their own informed decisions about whether or not to participate.¹² Children on the other hand, usually do not understand the potential consequences associated with reality television and may not be given a choice regarding their participation. This is even more concerning due to the fact that children are “less capable of censoring words and inhibiting actions that adults may recognize as inappropriate, embarrassing, or self-damaging.”¹³ This may make it more difficult for children to avoid the potential negative effects to their reputation, future career and, most importantly, their general well-being.¹⁴ Furthermore, during childhood, children are in the process of developing their personalities and may be more susceptible to negative influences and risks of psychological damage.¹⁵

¹¹ Royal, *supra* note 8, at 440.

¹² Podlas, *supra* note 7.

¹³ Greenberg, *supra* note 1, at 604-05.

¹⁴ *Id.*

¹⁵ Royal, *supra* note 8.

Due to the reality television goal of portraying the “realistic” lives of participants, reality children may suffer from self-identity issues.¹⁶ Unlike child actors, who portray a character on screen and can separate their actual selves from the roles they play, children on reality television cannot.¹⁷ Moreover, they are purportedly appearing as themselves, but at the same time cannot control what producer-made edits end up appearing on screen.¹⁸ When they are depicted in a negative light, they are not shielded from potential adverse consequences by the fact that they were just “acting.” Furthermore, the potential that children on reality television will be portrayed in a less than positive light is huge considering many producers try to capture their rawest emotions and deficiencies in order to provide “good television.”¹⁹ Producers are known to encourage additional drama and may go even further by directing children’s actions and feeding them lines.²⁰ This may lead to negative portrayals of the children that could have negative effects on their self-image and psychological health in the future.²¹

An additional concern, which has already been a problem for child actors in the past, is the potential for parental exploitation. Exploitation is defined by Black’s Law Dictionary as “the act of taking advantage of something; especially, the act of taking unjust advantage of another for one’s own benefit...”²² In the past parental exploitation was typically financially motivated, however with the emergence of reality television, parents nowadays may view their children not only as a source of financial opportunity but also fame and celebrity.²³ Exploitative parents may control their children’s lives to the extreme, exposing them to potential harm, and taking all or

¹⁶ Katherine Neifeld, *More than a Minor Inconvenience: The Case for Heightened Protection for Children Appearing on Reality Television*, 32 HASTINGS COMM. & ENT. L.J. 447, 451-452 (2010)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Royal, *supra* note 8, at 440.

²⁰ *Id.* at 445-46

²¹ *Id.*

²² Black’s Law Dictionary 660 (9th ed. 2009). (definition of exploitation)

²³ Ramon Ramirez, *What Will It Take?: In the Wake of the Outrageous “Balloon Boy” Hoax, A Call to Regulate the Long-Ignored Issue of Parental Exploitation of Children*, 20 S. CAL. INTERDISC. L.J., 617, 620 (2011).

most of the compensation they earn.²⁴ Child star Drew Barrymore, who starred in ET in 1981 at age six, suffered from such exploitation.²⁵ “Her autobiography describes a failed-actress mother determined to achieve fame by taking seven year old Barrymore to clubs and parties, and an alcoholic father who appeared periodically in Barrymore’s life only to demand money.”²⁶ Sadly, Barrymore, like many other child stars, turned to drugs and alcohol and was admitted to a rehabilitation program at only age thirteen.²⁷

Consequently, the frequency of parental exploitation in regards to both child actors, and even more so with children on reality television, leads to concern over these children’s finances. Child star Shirley Temple for instance, had an extremely successful career, supported her twelve member household, and in the end was left with assets totaling only a few thousand dollars.²⁸ Similarly, Macaulay Culkin, the star of the famous Home Alone Movies, was his parents’ primary source of income during his career and ultimately ended up suing them to gain control of his finances.²⁹ As a result of these various concerns, attention must be given to the welfare of children on reality television and whether sufficient federal and state laws exists to protect them.

On the other end of this spectrum is the frequent exploitation of children on reality television by producers of these shows. Although some children (or more likely their parents) on reality shows are given substantial amounts of money for their participation, most are given very little.³⁰ This is due to the fact that children on reality television are not considered “employees” and therefore most federal and state laws do not regulate their compensation. Another major reason for this is because unlike child actors and performers, children on reality television are not

²⁴ *Id.* at 641.

²⁵ *Id.* at 637.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Royal, *supra* note 8, at 441.

²⁹ *Id.*

³⁰ Glickman, *supra* note 6.

represented by unions such as the Screen Actors Guild (“SAG”) and the American Federation of Television and Radio Artists (“AFTRA”) to provide them with protection.³¹ In fact, the genre has been referred to as “Hollywood’s sweatshop”³² because of the low costs of production and producers’ ability to forum shop.³³

III. Federal Law

Currently, the Fair Labor Standards Act (“FLSA”) is the only federal statute regulating child labor in the United States³⁴ and it expressly exempts child actors and performers from its protections.³⁵ Unfortunately, because reality television is a relatively new phenomenon it is unclear whether such children fall under the FLSA’s provisions or whether they fall under its protection at all. Some, including producers, take the position that children on reality television do not fall under FLSA’s scope because they are not considered to be “working,” and some argue that although they fall within its scope, they are exempted from the statute’s protection under the Shirley Temple Exemption. This uncertainty has caused confusion over the regulation of children participating in reality television at the federal level, which has in turn lead to insufficient protections.

A. Fair Labor Standards Act

The 1938 Fair Labor Standards Act is the primary federal law regulating labor practices in the United States³⁶ and has established a national standard regarding minimum wage,³⁷

³¹ Greenberg, *supra* note 1, at 597-98.

³² Royal, *supra* note 8, at 453.

³³ *Id.* at 602.

³⁴ Fair Labor Standards Act 29 U.S.C. § 212.

³⁵ Fair Labor Standards Act 29 U.S.C. § 213(c).

³⁶ Podlas, *supra* note 7, at 47.

³⁷ Fair Labor Standards Act 29 U.S.C. § 206.

maximum working hours,³⁸ and most importantly for our purposes, child labor standards.³⁹ The provisions relating to children involved in employment relationships endeavor to protect the safety and well being of young workers by regulating the amount of hours per day and days per week they may work.⁴⁰ Some provisions go even further by completely prohibiting the employment of children under a certain age or in certain occupations.⁴¹ For instance, the statute bans “oppressive child labor,” which it defines as:

a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer...in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation [that is]...particularly hazardous for the employment of children between such ages or detrimental to their health or well-being.⁴²

Accordingly, the FLSA prohibits the employment of children under the age of 16 unless otherwise permitted by the Secretary of Labor.⁴³

B. The Shirley Temple Act Exemption

The FLSA expressly exempts certain groups of children from its child labor provision, allowing them to work under the age of 16.⁴⁴ The exemption most critical for our purpose states, “The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”⁴⁵ Congress included this exemption because it did not consider child acting to be “oppressive labor,” due in part to its focus on developing a child’s talents.⁴⁶ This

³⁸ Fair Labor Standards Act 29 U.S.C. § 207.

³⁹ Fair Labor Standards Act 29 U.S.C. § 212.

⁴⁰ Podlas, *supra* note 7, at 56.

⁴¹ *Id.*

⁴² Fair Labor Standards Act 29 U.S.C. § 203(i); Greenberg, *supra* note 1, at 619.

⁴³ *Id.* at 620.

⁴⁴ Fair Labor Standards Act 29 U.S.C. § 213(c).

⁴⁵ Fair Labor Standards Act 29 U.S.C. § 213(c)(3).

⁴⁶ Podlas, *supra* note 7, at 58.

exemption is known as the “Shirley Temple Act” because when the Act was enacted the child actor Shirley Temple was popular and without the exemption she would not have been able to continue her acting career at such a young age.⁴⁷

C. FLSA Applied to Children on Reality Television

The current FLSA does not protect children on reality television for two potential reasons. First, they either do not fall under FLSA’s scope or they fall under its exemption for child performers. In order to fall under the FLSA’s scope, a person must be considered to be both “working” and “an employee” within an employment relationship.⁴⁸ Unfortunately, in order to circumvent their compliance with FLSA provisions, producers of reality shows usually take the position that their participants are neither “working” nor “employees”.⁴⁹ They instead argue that participating children are merely allowing producers to come into their homes to film their everyday lives.⁵⁰

However, even if it can be argued that children on reality television are “working” for purposes of the FLSA, the question remains whether they would then be exempt from its protections under the Shirley Temple Act exempting child actors and performers. One could argue that reality children are “acting” because producers sometimes direct their actions or feed them lines, but it is probably even easier to argue that these children are instead “performers.” “Performer” is defined by the Secretary of Labor as anyone who:

performs a distinctive, personalized service as a part of an actual broadcast or telecast including . . . any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by . . . announcing, or describing or relating facts, events and other matters of interest, and who actively

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 61.

⁵⁰ *Id.*

participates in such capacity in the actual presentation of a radio or television program.⁵¹

The question of whether children on reality television fall within the Shirley Temple Act exemption has not yet been addressed by courts, but it seems clear that one could make the argument, thereby exempting these children from FLSA protection.

Furthermore, the fact that child actors and performers are expressly exempt from FLSA protection would seem to suggest that Congress most likely intended that children on reality television also be exempt, however this is most likely not the case. Unlike children participating on reality television, child actors and performers are represented by Hollywood unions like SAG and AFTRA, and are therefore provided with additional protections.⁵² When the Shirley Temple Act was enacted, reality television was non-existent and Congress may have created the exemption assuming that all children on television would be represented by these unions and therefore would not need additional protections.⁵³ Consequently, “reality participants thus often find themselves in a legal grey area within which they are doubly unprotected: denied employee status by producers and denied membership in the unions.”⁵⁴

IV. State Laws

It is clear that current federal law does nothing to protect children on reality television, thereby forcing them to turn to state law for protection. Unfortunately, the fact that states are provided full discretion in regulating child labor in the entertainment industry⁵⁵ has led to minimal protections and huge disparity among laws afforded by each. States where the

⁵¹ Royal, *supra* note 8, at 456-57.

⁵² Greenberg, *supra* note 1, at 597-98.

⁵³ *Id.* at 623.

⁵⁴ *Id.* at 597-598.

⁵⁵ Christopher C. Cianci, Entertainment or Exploitation?: Reality Television and the Inadequate Protection of Child Participants Under the Law, 18 S. Cal. Interdisc. L.J., 363, 375 (2009).

entertainment industry is prevalent, such as California and New York, have enacted comprehensive laws protecting children in these industries, but most others provide minimal to no protection whatsoever.⁵⁶ Moreover, because applicable laws are based on where a particular show is filmed, producers are able to advantageously forum shop allowing them to film in states with minimal regulations.⁵⁷ Due to such inconsistency among state laws and producers' ability to forum shop, children in the entertainment industry are left vulnerable and inadequately protected.

Furthermore, even in the few states that do provide child labor laws for the traditional entertainment industry, it is unclear whether such protections apply to the reality television genre.⁵⁸ The debate centers on the same question as with federal law, in particular, whether children on reality television are "working" and "employees" under state statutes.⁵⁹ Thus, although a few states have taken action in providing additional protections for children in the traditional entertainment industry, there is still much to be done, especially considering the growing number of reality television shows with children participants. In beginning to think about the need for uniform labor laws protecting children on reality television, California and New York's statutory schemes provide useful models.

A. California Laws

California law affords children in the entertainment industry more protection than any other state⁶⁰ by regulating not only the conditions under which they may work, but also their education and finances. Before a minor under the age of eighteen can even be employed in the entertainment industry, the California Labor Code requires that both the minor and the employer

⁵⁶ Ramirez, *supra* note 23, at 621.

⁵⁷ Greenberg, *supra* note 1, at 597-98.

⁵⁸ Cianci, *supra* note 55, at 382.

⁵⁹ Podlas, *supra* note 7, at 58.

⁶⁰ Cianci, *supra* note 55, at 376-78.

first obtain a permit.⁶¹ Additionally, any minor who seeks to invoke the Shirley Temple Act exemption to the FLSA, allowing them to work under the age of sixteen as child actors or performers, must also obtain written consent from the California Labor Commission.⁶²

According to the statute, consent is only given if the following are met:

“(a) The environment in which the performance . . . is to be produced is proper for the minor. (b) The conditions of employment are not detrimental to the health of the minor. (c) The minor's education will not be neglected or hampered by his or her participation in the performance . . .”⁶³

California regulations provide that any violation of the Code may result in suspending or revoking a child's permit.⁶⁴

Once a child obtains a permit to work in the entertainment industry (and consent if under the age of sixteen), the California Labor Code restricts the amount of hours they may work based on their age.⁶⁵ No minor under the age of eighteen is permitted to work more than eight hours a day or over forty-eight hours a week, and must only work between the hours of 5 a.m. and 10 p.m. preceding a school day.⁶⁶ The California Labor Commission further provides the following specific hour restrictions based on age: no more than six hours if under eighteen; five hours if under sixteen; four hours if under nine; three hours if under six; two hours if under two; twenty minutes if under six months; and infants under 15 days are categorically prohibited from working.⁶⁷ Violation of a minor's maximum work hours is considered a misdemeanor and punishable by a fine between five hundred to one thousand dollars and/or imprisonment in county jail for no more than 60 days.⁶⁸ Also, if a child has not graduated from high school,

⁶¹ *Id.*

⁶² *Id.*

⁶³ Cal. Lab. Code. § 1308.6(a)-(c) (West 1997).

⁶⁴ Cal. Code Regs. tit. 8, §11758 (West 1999).

⁶⁵ Cianci, *supra* note 55.

⁶⁶ Cal. Lab. Code § 1308.7(a) (West 1997).

⁶⁷ Cal. Code Regs. tit. 8, §11760(a)-(f)(West 1999).

⁶⁸ Cal. Lab. Code § 1308.7(c) (West 1997).

California requires that a tutor or studio teacher be present on set to teach them a minimum of three hours a day during the time that regular school is in session.⁶⁹ Additionally, if the child is under sixteen, the teacher is responsible for their welfare and may remove the child from set if he or she determines that it is detrimental to their health.⁷⁰

California also protects a child entertainer's finances, which can be a significant concern considering their potential to earn a substantial amount of money. California's Family Code requires that a trust called a "Coogan Account" be created in which a child's employer must set aside 15% of the child's gross earnings in order to safeguard it for the child's benefit.⁷¹ It further provides that the child's parent, legal guardian, or other person (if in the child's best interest) be appointed trustee and that he or she has a duty to monitor the funds, barring any person from withdrawing money until the beneficiary himself turns eighteen or is emancipated.⁷² This law was enacted in 1939 in response to the unfortunate story of child star Jackie Coogan, whose mother spent all of his career earnings, and has since been known as "Coogan's Law."⁷³ Unfortunately for Coogan, before the California law's enactment a child's earnings were considered to belong only to his or her parent.⁷⁴ Today, New York, Louisiana and New Mexico have followed California's lead and enacted similar statutes.⁷⁵

It is clear that California has taken action in implementing statutes in order to protect children employed in the entertainment industry, but whom exactly do these statutes actually protect? In order for children employed in the entertainment industry to be subject to California law, they must either be employed in the state, or be residents of the state employed outside the

⁶⁹ Cianci, *supra* note 46, at 376-78.

⁷⁰ *Id.*

⁷¹ Cal. Fam. Code §6752.

⁷² *Id.*

⁷³ Royal, *supra* note 4, at 459-460

⁷⁴ SAG-AFTRA UNION ONE, <http://www.sagaftra.org> (last visited on April 18th, 2013)

⁷⁵ *Id.*

state pursuant to a contract created in California.⁷⁶ Therefore, although California law provides numerous protections for child entertainers, producers are still able to avoid its laws by hiring non-resident children and filming outside the state.⁷⁷ Even more critical for our purposes is whether California law regulating children employed in the traditional entertainment industry applies to children on reality television. Fortunately, the California Labor Commission has provided us with a clear answer, explaining that children filmed on reality shows *are* subject to all of the laws governing minors in the entertainment industry.⁷⁸ In 2003, a television production company sought clarification on the issue, to which staff attorney David Gurley responded by letter stating,

The constant presence of cameras, lighting equipment, and crew etc., do not allow a child to conduct his/her ‘normal routine’ . . . the control of directors and producers may not rise to the level of a typical situation-comedy, but would nevertheless exercise enough control to create an employer/employee relationship.⁷⁹

B. New York Law

New York, a state where the entertainment industry is also prevalent has modeled its laws protecting children in the industry after California and has provided similar protections regarding children’s working conditions, education, and finances.⁸⁰ Section 35.01 of the New York Arts and Cultural Affairs Law is the primary statute pertaining to child performers, and at first glance it seems to be more restrictive than in actuality. Subsection one state,

it shall be unlawful, except otherwise provided by section one hundred-fifty-one of the labor law, to employ . . . or to use . . . any child under the age of sixteen years . . . whether or not an admission fee is charged or whether or not such child or any other person is to be compensated⁸¹

⁷⁶Cal. Code Regs. tit. 8, § 11756 (1999); Cianci, *supra* note 55, at 376-78.

⁷⁷Glickman, *supra* note 6, at 154.

⁷⁸*Id.* at 160-61.

⁷⁹*Id.*

⁸⁰Royal, *supra* note 8, at 461.

⁸¹*Id.*; N.Y. Arts & Cult. Aff. Law § 35.01(1) (McKinney 2004).

Although this provision seems to suggest that it is unlawful to employ minors under sixteen in the entertainment industry, subsection 2 states that the prohibition does not apply to children “in a private home,”⁸² which likely exempts children participating in most reality television. Furthermore, Section 151 of the New York Labor Law referred to in the above statute provides that children under sixteen may be employed if a child performer permit is issued, regardless of whether or not they are “in a private home.”⁸³ In fact, employment permits are required of all child performers in New York,⁸⁴ making Section 35.01 of the New York Arts and Cultural Affairs Law seem unnecessary as it could instead simply state that all child performers under the age of eighteen must obtain permits. Such permits in New York are valid for one year, “may be revoked for good cause, and ‘[n]o permit shall allow a child to participate in an exhibition, rehearsal or performance which is harmful to the welfare, development or proper education of such child.’”⁸⁵

New York has also implemented extremely similar protections as California in terms of a child performer’s education and finances. For instance, it requires that a qualified teacher be provided to children who have not yet obtained their high school diplomas and whose schedules do not permit a traditional education.⁸⁶ It also has a statute almost exactly like California’s Coogan Law, requiring that a trust be created for child performers and that employers deposit 15% of a child’s gross earnings into the account.⁸⁷

⁸² *Id.* at §35.01(2); Royal, *supra* note 8, at 461-64; NY Code of Rules and Regs. § 186-1.3 (effective April 1, 2013).

⁸³ N.Y. Lab. Law § 151.

⁸⁴ *Id.*; N.Y. Arts & Cult. Aff. Law § 35.01(3); NY Code of Rules and Regs. § 186-3.1 (effective April 1, 2013).

⁸⁵ Royal, *supra* note 8, at 461; NY Code of Rules and Regs. § 186-3.2 (effective April 1, 2013).

⁸⁶ Cianci, *supra* note 55, at 380.

⁸⁷ *Id.*; N.Y. Arts and Cult. Aff. Law § 35.03.

Like California, New York law protecting children employed in the entertainment industry applies to all children employed in the state and also to children employed out of state that are residents of New York (unlike in California, no mention is made of a requirement that contracts be created in the state).⁸⁸ One question that remains unclear in New York is whether these laws apply to children on reality television.⁸⁹ Unlike the California Labor Commission which has made a clear statement addressing this question, New York law remains unclear and left up for interpretation.⁹⁰ One thing that leads to the conclusion that New York law may not apply to children on reality television is the fact that the general prohibition of Section 35.01 of the New York Arts and Cultural Affairs Law does not apply to children “in private homes”, thereby allowing *most* children on reality television to be employed under the age of sixteen.⁹¹ Furthermore, the statutes requiring children to obtain permits apply only to “child performers,” but it is unclear whether this term is meant to include children participating in reality television.⁹² One New York law however, that does clearly protect children participating in reality television is the trust requirement, as it includes children who are participating in contracts for their likeness or stories of their lives.⁹³

C. Other States

It is apparent that both California and New York have created comprehensive and effective regulatory schemes in order to protect children in the entertainment industry. The problem is that they are among the minority of states to provide such protections, leaving most

⁸⁸ Cianci, *supra* note 55, at 379.

⁸⁹ Royal, *supra* note 8, at 463.

⁹⁰ *Id.* at 464.

⁹¹ *Id.* at 463.

⁹² *Id.*

⁹³ *Id.* at 464.

children in the entertainment industry, and more specifically on reality television, extremely vulnerable and unprotected.⁹⁴

For instance, Vermont's child labor laws do not provide specific protection to children on reality television and in fact provide very little protection to any child performer in general.⁹⁵ This is because like the FLSA, Vermont exempts children participating in television from its labor provisions thereby providing them with almost no protection.⁹⁶ Vermont addresses educational concerns by requiring that the commissioner of education approve the educational programs provided to child performers during their employment and limits such employment to no more than ninety days during the school year, however it fails to provide any protections to address such children's finances, potential for exploitation and/or potential for psychological harm.⁹⁷

In Montana, child performers (and children on reality television) receive even less protection than in Vermont and other states as they are expressly exempt from all of the state's child labor laws.⁹⁸

V. Proposal for Creation of New Law

It is clear that children participating in reality television are not provided adequate protection by current federal or state law. They are exempt from FLSA protection and inconsistency among state laws allow producers to avoid stringent regulation by forum

⁹⁴ Ramirez, *supra* note 23, at 621.

⁹⁵ Royal, *supra* note 8, at 468-69.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 471.

shopping.⁹⁹ The best way for Congress to address this problem is to enact a comprehensive federal statute specifically regulating the employment of children on reality television.¹⁰⁰

Simply repealing the FLSA's Shirley Temple exemption in order for all child actors and performers to be covered may be overbroad.¹⁰¹ It would prevent any child under the age of sixteen from working in the entertainment industry, and would subject those performers over sixteen to labor laws that may be too stringent for work in the entertainment industry. This seems unnecessary for several reasons. First, for reasons already stated, child actors and performers are not faced with the same dangers of exploitation as children on reality television.¹⁰² Second, child actors and performers are represented by Hollywood unions, such as SAG and AFTRA that provide them with the specific protection necessary in the entertainment industry.¹⁰³ Furthermore, even if the Shirley Temple exemption were repealed, it would not ensure the adequate protection of children participating in reality television due to their unique circumstances and potential for exploitation.¹⁰⁴

States that currently provide minimal or no protection for children employed in the entertainment industry should enact legislation accordingly and should expressly provide that such laws apply to children on reality television.¹⁰⁵ Although a step in the right direction, requiring all states to enact stringent statutes regulating children on reality television, similar to California and New York laws, may still result in inconsistency among states.¹⁰⁶ This is because courts in each jurisdiction would be free to interpret their laws without being bound by the

⁹⁹ Greenberg, *supra* note 1, at 620.

¹⁰⁰ *Id.* at 474-76.

¹⁰¹ Royal, *supra* note 8, at 475.

¹⁰² *Id.*

¹⁰³ Greenberg, *supra* note 1, at 597-98.

¹⁰⁴ Royal, *supra* note 8, at 475.

¹⁰⁵ Cianci, *supra* note 55, at 387.

¹⁰⁶ Royal, *supra* note 8, at 473.

precedent of other state courts, likely resulting in different judicial interpretations.¹⁰⁷ Thus, a comprehensive federal statutory scheme providing states with minimum mandatory standards to follow is the best option.¹⁰⁸

A. Uniform Federal Statute

When enacting a comprehensive federal statute, inspiration can be drawn from California and New York statutes. The first major issue that should be addressed is that the statute should explicitly provide that its provisions apply to children participating in reality television regardless of in what state the shows are filmed. Furthermore, because the term “reality television” has been the subject of much debate, it should be clearly defined under the new federal statute. Borrowing from New York’s newly effective regulations:

“reality show” shall mean the visual and/or audio recording or live transmission, by any means or process now known or hereafter devised, of a child appearing as himself or herself, in motion pictures, television, visual, digital, and/or sound recordings, on the internet, or otherwise.

“Reality show” shall not include recording or live transmitting of non-fictional: (1) athletic events; (2) academic events, such as, but not limited to, spelling bees and science fairs; and (3) interviews in newscasts or talk shows.¹⁰⁹

One adjustment to this definition should be made however, because producers who want to avoid regulation may argue that children participating in certain shows are not completely “appearing as [themselves]” because they may be fed lines or their actions may be directed in somehow. In order to prevent this, the statute might instead read, “a child appearing to any extent as himself or herself.” This definition would then include not only those children who are given complete discretion when being filmed but also those whose behavior is encouraged or

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ NYCRR 12 §186-2.1(s).

directed in some way.

B. Child Labor Laws

The proposed federal statute should include various labor provisions similar to those under the current FLSA, but should be specifically tailored to meet the particular needs and concerns of children on reality television. First, such children should be characterized as “employees” under the new federal statute so that it is clear that such children are protected by both federal law and state labor laws. According to the New York Times, this was already done by the highest French court in 2009, when it held that participants in the French show “Temptation Island” were “entitled to employment contracts and financial compensation—just as professional actors would be.”¹¹⁰ Moreover, characterizing these children participants as “employees” may give Hollywood unions an incentive to include them in the scope of their representation thereby providing them with additional protection.

Also, the statute should prohibit children below a certain age from appearing on reality television.¹¹¹ Although New York and California statutes allow minors under the age of sixteen to participate in traditional entertainment industries as long as they have a permit (and consent in California)¹¹², under the proposed federal law minors under this age may have to be prohibited from participating in reality television due to the potential negative effects to their self-image and overall psychological health.¹¹³ In order to decide at exactly what age the statute should permit minors to participate in reality shows, Congress should consult child psychologists and other

¹¹⁰ Glickman, *supra* note 6, at 163.

¹¹¹ Royal, *supra* note 8, at 474-76.

¹¹² Cianci, *supra* note 55, at 376-78; N.Y. Lab. Law § 151.

¹¹³ Royal, *supra* note 8, at 445-46.

experts to determine at what age such harm is diminished.¹¹⁴ Nevertheless, the statute should require that all minors under the age of eighteen obtain a valid work permit from the Labor Commissioner. Drawing from California law, such permits should only be given if the Commission determines that the prospective environment is proper for a minor, not detrimental to their health in any way, and that the minor's education will not be negatively affected.¹¹⁵ Similar to New York law, permits should expire every year in order to ensure that producers are continuing to abide by the statutes.

Once a child obtains a valid permit, the proposed federal labor law should set minimum restrictions regarding the amount of hours a day and days per week minors are permitted to work based on their age. This again should be determined by consulting experts in the field. It may be appropriate for instance, if eighteen year olds were permitted to work eight hours, seventeen year olds were permitted to work seven hours, and sixteen year olds permitted to work 6 hours. Additionally, borrowing from New York law, it seems appropriate that minors only be permitted to work between the hours of 5 a.m. and 10 p.m.¹¹⁶ However, unlike in California, this restriction should apply regardless of whether or not the minor has school the following day because it seems unnecessary for minors to ever be filmed between the hours of 5 a.m. and 10 p.m. Also, if a child has not graduated from high school, the new federal statute should require that such a child meet the traditional requirement of obtaining 180 days of schooling, whether in a traditional school setting or by private tutors. Although this may be difficult considering a reality child's schedule, this educational requirement is essential to each child's future.

¹¹⁴ Royal, *supra* note 8, at 474-76.

¹¹⁵ Cal Code Regs. tit. 8 § 11758 (West 1999).

¹¹⁶ Cal. Lab. Code § 1308.7(a) (West 1997).

Lastly, in enacting the proposed federal law Congress should adopt a version of California's "Coogan's Law"¹¹⁷ in order to protect children on reality television's finances. As explained, the California law requires that a trust be created for minors in the entertainment industry and that their employers deposit 15% of the child's gross income into the trust for the child's benefit once he or she reaches the age of eighteen.¹¹⁸ Although such a trust may be less necessary under the proposed federal law due to the fact that most children under the age of sixteen would likely be prohibited from participating on reality television and therefore would not be earning a salary, such a trust should still be required for children between the ages of sixteen and eighteen who may still lack the necessary maturity to control their finances. Furthermore, California's requirement that employers set aside only 15% of the minor's gross earnings¹¹⁹ should instead be increased to at least 30%.

Similarly to the FLSA, fines should be imposed against production companies who violate the new federal labor laws. Under the FLSA, "an employer 'who willfully violates any of the provisions...[may] be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both.'¹²⁰

C. Child Welfare Laws

When enacting the proposed federal statute, in addition to including the above labor provisions, Congress should include child welfare provisions that specifically address the concerns facing children participating in reality television. As mentioned in Section II, children participating in reality television face a number of potential negative consequences to their future

¹¹⁷ Royal, *supra* note 8, at 459-460.

¹¹⁸ Cal. Fam. Code § 6752.

¹¹⁹ *Id.*

¹²⁰ Greenberg, *supra* note 1, at 620.

and may not be mature enough to make informed decisions about whether or not to participate.¹²¹ They are less capable of censoring their words and actions in order to prevent damaging their future image; they may suffer from self-identity issues if portrayed negatively as “themselves” on screen;¹²² and they may suffer from exploitation from both parents and producers.¹²³ “These children have been stripped of their privacy and put into situations that may harm their emotional well-being, and [that] the type of parents who put their children in such situations may not adequately protect their children’s interests.”¹²⁴ In order to protect such children, new child welfare provisions should be enacted to specifically address their unique situations.

Presently, there are both federal and state child welfare laws in place, however similarly to current labor laws, they are inadequate to protect children participating in reality television for various reasons. First, child welfare laws were not enacted to address the unique concerns that such children face, but instead encompass statutes that are specifically tailored to protect children from physical, sexual and emotional abuse and neglect by their parents or relatives.¹²⁵ Although these laws are essential to protect all children from these types of serious harm, they are not tailored to address the specific issues that reality children face. As discussed *supra*, such children may face unique harms, such as self-identity issues and psychological harm that may remain unnoticed until later in their lives.¹²⁶ Although these are serious concerns, they may not fit properly under the categories, or rise to the level of “abuse” or “neglect” under current federal and state child welfare law.

¹²¹ Podlas, *supra* note 7.

¹²² Greenberg, *supra* note 1, at 604-05.

¹²³ Neifeld, *supra* note 16.

¹²⁴ *Id.*

¹²⁵ Dickon Reppucci, Carrie S. Fried, *Child Abuse and the Law*, 69 UMKC L. Rev. 107, 107 (2000).

¹²⁶ Royal, *supra* note 8, at 445-46.

Similarly to child labor law, although federal standards exist, states are given a huge amount of discretion when enacting state law, which has led to inconsistency across state lines. In 1974, President Richard Nixon signed The Child Abuse Prevention and Treatment Act.¹²⁷ The Act required states seeking financial assistance from the federal government to implement certain programs to address child abuse and neglect.¹²⁸ In order to receive funding, states had to enact new statutes or make changes to current statutes in order to conform to the new federal requirements.¹²⁹ Details however were left to the states, which has led to variation among state law. For instance, state legislatures define forms of child abuse and neglect differently, which makes it difficult to detect child maltreatment across state lines.¹³⁰ This is especially a problem because of the ambiguous and confusing definitions provided by some states,¹³¹ and because some have broader definitions of what is considered child abuse than others.¹³² This is especially significant with regards to children participating in reality television because some states do not include emotional or psychological abuse under their statutes, but only physical and sexual abuse.¹³³ Even worse, some states require “intent” on the part of the perpetrator in determining the existence of abuse. Some examples of legal standards include, “by other than accidental means,” “knowingly,” and “intentionally.”¹³⁴ “These differences result in varying degrees of protection for the abused child and his family, depending upon the state in which the child lives.”¹³⁵

¹²⁷ Marjorie R. Freiman, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 *Geo. Wash. L. Rev.* 243, 250 (1982)

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Freiman, *supra* note 127, at 247.

¹³² Reppucci, *supra* note 125, at 110.

¹³³ *Id.*

¹³⁴ *Id.* at 111.

¹³⁵ Freiman, *supra* note 127, at 252.

Furthermore, whether or not individuals are motivated to report such instances of child maltreatment is driven by the reporting laws of each state.¹³⁶ These laws identify individuals who are required to report suspected abuse, and identify the level of suspicion required for reporting.¹³⁷ Variations among reporting laws lead to considerable differences in the number of children reported as victims in each state, and can range from about 8 to 78 per every 1000.¹³⁸ This is most likely due to the fact that higher rates of reporting come from those states that mandate more categories of individuals to report and which have broader definitions of abuse and neglect.¹³⁹

One potential issue in enacting new federal child welfare provisions specifically protecting children on reality television is whether the government has the power to enact such laws prohibiting parents from allowing their children to participate or restricting that right in any way. Parents have a fundamental liberty right protected by the Fourteenth Amendment Due Process Clause to raise their children how they see fit.¹⁴⁰ The Supreme Court protects this right by strictly scrutinizing any government law interfering with it, and only allows such law to survive if it is “narrowly tailored to serve compelling government interests.”¹⁴¹ In these circumstances, the government looks at the best interests of the child and has such a compelling interest when, “parental decisions jeopardize the safety, health, and well-being of their children.”¹⁴² Obviously, there is a danger in allowing the government to intervene to too great of an extent with the rights of families, however such child welfare laws are essential and would likely pass constitutional muster because of the serious psychological and emotional harms these

¹³⁶ *Id.* at 107.

¹³⁷ *Id.*

¹³⁸ *Id.* at 108.

¹³⁹ *Id.*

¹⁴⁰ Ramirez, *supra* note 23, at 642.

¹⁴¹ Royal, *supra* note 8, at 483-84.

¹⁴² Ramirez, *supra* note 23, at 646-47.

children commonly face. This is especially true due to the prevalence of parental exploitation explained in section II, and the prospective of fame and fortune that may blind some parents to the best interests of their children.¹⁴³

VI. Conclusion

Reality television as a genre has been immensely popular for over a decade and “has evolved from an apparent short-term fad to an enduring staple of American popular culture.”¹⁴⁴ Unfortunately, the participation of children has likewise become a new phenomenon and with it has emerged new problems that the current legal regime is not fit to address.¹⁴⁵ Children on reality television are vulnerable to exploitation and psychological harm due to their parents’ desire for fame and money, and because of producers’ need for ratings and profit. Currently, these children are inadequately protected by the current federal labor statute that exempts child actors and performers from its protections, and by varying state laws which provide them with minimal to no protection.

The lack of protection provided to these children seems laughable when one looks at the protection that even animals are provided. Animals seen on reality television are considered a protected group and are represented by American Human Association.”¹⁴⁶ “The bottom line is that ‘[p]roducers should no longer be allowed the luxury’ to forum shop and manipulate the system.”¹⁴⁷ In order to best address these concerns, a new comprehensive federal statutory scheme, including both child labor and child welfare provisions specifically protecting children

¹⁴³ Royal, *supra* note 8, at 449.

¹⁴⁴ Greenberg, *supra* note 1, at 600.

¹⁴⁵ *Id.* at 499.

¹⁴⁶ Glickman, *supra* note 6, at 164-165.

¹⁴⁷ Glickman, *supra* note 6, at 167.

participating in reality television is needed.¹⁴⁸ States in turn should recognize the need to regulate children employed in the industry and should use the proposed federal system as a minimum standard in order to adequately protect children across state lines.

¹⁴⁸ Royal, *supra* note 8, at 474-76.