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Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming

Dayna B. Royal

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JON & KATE PLUS THE STATE:
WHY CONGRESS SHOULD PROTECT CHILDREN IN
REALITY PROGRAMMING

*Dayna B. Royal**

To turn children into profit is to touch profanely a sacred thing.
Dr. Felix Adler.¹

The term child labor is a paradox, for when labor begins . . .
the child ceases to be.
Rabbi Stephen S. Wise.²

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1. See VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD 6, 70 (1985) (quoting Dr. Felix Adler) (quotations omitted).

2. See *id.* at 55 (quoting Rabbi Stephen Wise) (quotations omitted).

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I. INTRODUCTION

“MOM TO MONSTER” roared the June 2009 cover of the tabloid magazine, *Us Weekly*.³ Inside, the reader discovers in large type: “Rocked by scandal and infatuated with fame, Kate Gosselin has cut a swath of terror.”⁴ Juxtaposed next to this harsh accusation is a photograph of an angry woman yelling at her husband while her little children look on in the background.⁵

Kate Gosselin, husband Jon, and their eight children starred in the hit reality show, *Jon & Kate Plus Eight (Jon & Kate)*, which chronicled the tumultuous life of two parents raising eight children—now 8-year-old twins and 5-year-old sextuplets.⁶ For years, the Gosselins captivated viewers across the country.⁷ The show featured constant parental bickering, which was characterized as one of its “main draws,” along with frequent, dramatic meltdowns of the Gosselin children.⁸ *Jon & Kate* was the most popular program in the history of its network, The Learning Channel (“TLC”).⁹ Nearly ten million viewers tuned in for the fifth season premiere.¹⁰ That was more than double the number who watched the fourth season finale several weeks prior.¹¹

3. See US WEEKLY, June 1, 2009, at cover.

4. See Mara Reinstein & Ericka Souter, *From Mom . . . to Monster*, US WEEKLY, June 1, 2009, at 65.

5. *Id.* at 64-65.

6. See Maureen Ryan, *Will Controversy Help Boost “Jon & Kate Plus 8” Ratings?*, CHI. TRIB., May 25, 2009, at 1; TLC, *Jon & Kate Plus Eight*, <http://tlc.discovery.com/tv/jon-and-kate/jon-and-kate.html> (last visited May 26, 2009).

7. See Ryan, *supra* note 6, at 1.

8. See *id.*

9. Kevin Engstrom, *Spreader of Manure; Rondeau Playing Manitobans for Fools with Claim Province Can Hit Kyoto Targets*, WINNIPEG SUN, May 31, 2009, at 6, available at http://www.winnipeg.sun.com/news/columnists/kevin_engstrom/2009/05/31/9629381-sun.html.

10. Tony Allen-Mills, *Falling Apart for All to See; The Scandals Rocking America’s Favourite TV Family are Drawing 10m Viewers*, SUNDAY TIMES (LONDON), May 31, 2009, at News 26, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6395873.ece.

11. See Chuck Barney, “*Jon & Kate*” – *A Marriage Implodes Before Our Very Eyes*, OAKLAND TRIB., May 31, 2009, at Entertainment TV Columnists; see also Ryan Christopher DeVault, “*Jon and Kate Plus 8*” *Season Finale Draws Millions of Viewers; Teases Fans of the Show*, ASSOCIATED CONTENT, March 26, 2009 at Arts and Entertainment.

The boost in ratings was undoubtedly due to a tabloid frenzy surrounding allegations that Jon and Kate were both having extramarital affairs.¹² While their marriage disintegrated before a television audience—they announced their divorce to nearly ten million viewers—the couple continued filming, earning a reported \$75,000.00 per episode, \$3,000.00 per hour for speaking engagements, and royalties from two books, with a third on the way.¹³ As the parents raked in money and other perks (ranging from gratis shopping sprees to free cosmetic surgery and vacations)¹⁴ while their marriage publicly crumbled, many began questioning the extent to which all of this detrimentally affected the eight children, who lived the majority of their young lives on camera.¹⁵

The Gosselin children are not alone. The recent popularity of reality television¹⁶ has ushered forth a flood of children living on

12. Eileen Fredes, *Anger Reigns on "Jon & Kate,"* NEWSDAY, May 25, 2009, at A10, available at <http://www.newsday.com/news/anger-reigns-on-jon-kate-1.743628>; *Critic's Corner*, BOSTON GLOBE, May 25, 2009, at G16; see also Allen-Mills, *supra* note 10, at News 26.

13. *Divorce Band-Aid "A Myth,"* 24 HOURS, July 13, 2009, at Lifestyle 11; *Rob Lowe Dodges Lawsuit*, ST. PETERSBURG TIMES, May 15, 2009, at 56; Aisha Sultan, *Dirty Laundry: The Jon & Kate Debate*, ST. LOUIS POST, June 6, 2009, at L9; see also Lynn Crosbie, *I Can't Wait for the 8 to Tell All*, GLOBE & MAIL, June 30, 2009, at R1. Though *Jon & Kate* took a short hiatus after the divorce announcement, the couple continued their show despite their situation. Cf. *In Brief*, ATLANTA J. CONST., August 3, 2009, at 1D.

14. See Reinstein & Souter, *supra* note 4, at 67-68.

15. See, e.g., Jocelyn Noveck, *For Some Jon & Kate Fans, the Show Must Not Go On*, EL PASO TIMES, June 26, 2009, at Lifestyle; Sultan, *supra* note 13, at L9; Editorial, *Protect Children on Reality TV*, TIMES-CALL, June 6, 2009, available at <http://www.timescall.com/editorial/editorial.asp?ID=16468> (last visited June 21, 2009); Good Morning America, *Jon & Kate, Plus Criticism; Is Wife Portrayed as Bad Guy?* (ABC television broadcast, May 25, 2009) (worrying that the eight Gosselin children are getting lost in all the media attention and wondering what will become of their futures); Michael Starr & David K. Li, *Jon & Kate Exploit Kids! – Kin Lash Out at Reality-TV Couple*, N.Y. POST, Late City Final, May 28, 2009, at 7; Allen-Mills, *supra* note 10, at News 26 (noting that *Jon & Kate* has raised questions about kids in reality television); James Poniewozik, *Jon & Kate Plus 8: This Would Be the "For Worse" Part*, TIME, May 26, 2009, available at <http://tunedin.blogs.time.com/2009/05/26/jon-kate-plus-8-this-would-be-the-for-worse-part/> (last visited July 22, 2009) (noting, in the comments, that one of the older Gosselin children has behavioral issues and wondering what toll the show is taking on the children; feeling sorry for the children and the effect the show will have on them; maintaining that the kids are being exploited; hypothesizing that participating in *Jon & Kate* will have long-term, psychological effects on the children); see also Julie Stensland, *Go Away Jon & Kate & Focus on Those 8*, FAMILY TIES, May 26, 2009, available at <http://parenting.thestateonline.com/index.php/archives/3711> (last visited July 22, 2009) (advising Jon and Kate to "[m]ake a good decision on behalf of your children. Lock the door, break the contract, leave the money behind and pull the pieces you have left of your life back together for the sake of these children").

16. See Joel Michael Ugolini, *So You Want to Create the Next Survivor: What Legal Issues Networks Should Consider Before Producing a Reality Television Program*, 4 VA. SPORTS & ENT. L. J. 68, 68-69 (2004) (noting that reality shows have proliferated the airwaves and are thriving).

camera.¹⁷ TLC airs at least five other reality shows featuring children, including *18 Kids and Counting*, *Table for 12*, and *Toddlers & Tiaras*.¹⁸ The We Network also boasts a reality show featuring youngsters competing for beauty pageant crowns.¹⁹ Its show, “Little Miss Perfect[,] tells the story of 10 families — primarily mothers and daughters — who will stop at nothing to win a crown . . . and some cash.”²⁰ The We Network now also has its own version of *Jon & Kate*. Its show *Raising Sextuplets* follows a couple raising their sixteen-month-old sextuplets.²¹ ABC’s *Supernanny* and CMT’s version, *Nanny 911*, follow behaviorally challenged children whose parents are at their wits’ end as self-proclaimed, child-rearing gurus intervene to improve the children’s behavior.²² BRAVO’s latest reality program, *NYC Prep*, films a group of high school students in “Manhattan’s elite high school scene.”²³

Celebrities also have starred in domestic reality shows. MTV’s *The Osbournes* chronicled the “[f]oul mouths, erratic behavior,” and “antics” of Ozzy Osbourne and his children.²⁴ According to MTV, “[t]he Osbournes are television’s most infamous family, plus they’re real and almost too raw for broadcast.”²⁵ Actress Tori Spelling’s show, which features her two young children, invites viewers to observe as she and her husband attempt to balance raising two small children with

17. Just a few of the many other reality shows that include children are *Gotti’s Way*, *Living Lohan*, and *Growing up Gotti*. See Gina Salamone, *Omigosh, Mom! No! Cringe Moments on the Boob Tube for “Reality” Kids*, N.Y. DAILY NEWS, May 26, 2009, at 22. In *Gotti’s Way*, the father told his kids on camera that he and his wife were separating, and his son “cried uncontrollably.” *Id.*

18. See TLC, *TV Shows*, <http://tlc.discovery.com/tv/tv-shows.html> (last visited May 27, 2009).

19. See WeTV, *Little Miss Perfect*, <http://www.wetv.com/little-miss-perfect/index.html> (last visited May 28, 2009).

20. *Id.*

21. See WeTV, *Raising Sextuplets*, <http://www.wetv.com/raising-sextuplets/about.php> (last visited Feb. 10, 2010).

22. See ABC, *Supernanny*, <http://www.supernanny.com/TV-Show.aspx> (last visited May 28, 2009); CMT, *Nanny 911*, http://www.cmt.com/shows/dyn/nanny-911/series_about.jhtml (last visited May 28, 2009); see also J. Matthew Sharp, Note, *The Reality of Reality Television: Understanding the Unique Nature of the Reality Genre in Copyright Infringement Cases*, 8 VAND. J. OF ENT. & TECH. L. 177, 178 n.7 (2005).

23. See BRAVO, *NYC Prep*, <http://www.bravotv.com/nyc-prep/season-1/about> (last visited May 27, 2009). BRAVO’s *Real Housewives* series also includes minors. See BRAVO, *The Real Housewives of New Jersey*, <http://www.bravotv.com/the-real-housewives-of-new-jersey> (last visited May 27, 2009); BRAVO, *The Real Housewives of New York City*, <http://www.bravotv.com/the-real-housewives-of-new-york-city> (last visited May 27, 2009); see also Salamone, *supra* note 17, at 22 (discussing the kids involved in both *Real Housewives* series).

24. See MTV, *The Osbournes*, <http://www.mtv.com/ontv/dyn/osbournes/series.jhtml#bio> (last visited May 28, 2009).

25. *Id.*

Hollywood careers, querying whether they are “up for the challenge.”²⁶ Even the family members of a professional wrestler star in such shows.²⁷ Hulk Hogan’s reality show, *Hogan Knows Best*, which featured his family, preceded the arrest of his son for recklessly racing a sports car and nearly killing a family friend.²⁸ Even notorious “Octomom,” Nadya Suleman,²⁹ landed a deal for a reality show to showcase her fourteen children.³⁰ “The show will be modelled [sic] after a successful Danish series that documents the lives of four children from birth until they become adults.”³¹

One is forced to wonder whether any laws exist to protect minors whose personal lives are laid bare as their own parents thrust them into the paparazzi’s spotlight. This article addresses this question, considering the best legal regime for regulating employment of children in reality programming,³² and suggesting an alternative to the status quo. To that end, Part II begins by identifying the various harms reality programming causes, arguing that participating in reality programming is detrimental both to the individual children who participate and to society in general. Part III surveys the current legal landscape, addressing first the federal law on point—the Fair Labor Standards Act—and then numerous state laws, focusing heavily on those states

26. Oxygen, *Tori & Dean: Home Sweet Hollywood*, <http://tori-and-dean.oxygen.com/about-the-show> (last visited May 28, 2009).

27. See IMDb, *Hogan Knows Best*, available at <http://www.imdb.com/title/tt0468996/> (last visited Aug. 12, 2009).

28. See Dan Lamothe, *A Warrior’s Story: After the Crash That Nearly Killed Him, Questions Remain About Lance Cpl.’s Life*, NAVY TIMES, July 28, 2008, at Newlines 34; Robert Green, *Hulk Hogan’s Son Gets Jail Time for Florida Crash*, THOMPSON REUTERS, May 10, 2008, available at <http://in.reuters.com/article/entertainmentNews/idINIndia-33504320080509>.

29. Aisha Sultan, *Dirty Laundry: How to Prevent Another Octomom*, ST. LOUIS POST-DISPATCH, March 9, 2009, at Lifestyle. Suleman attracted media attention when she delivered octuplets in early 2009. *Id.* Harsh criticism followed when the public learned that Suleman already had six children at home whom she was unable to support. *Id.*

30. See *Eight’s Enough in New TV Series*, N. TERRITORY NEWS (Australia), June 2, 2009, at 15 [hereinafter *Eight’s Enough*]; see also US WEEKLY, *supra* note 3, at 60 (quoting Suleman’s lawyer); Starr & Li, *supra* note 15, at 7.

31. *Eight’s Enough*, *supra* note 30, at 15.

32. The phrase “reality programming,” as it is used in this article, describes a format of entertainment in which individuals are employed to be filmed for profit (whether funds are paid to the individuals, their parents, or other agents) as they engage in purportedly unscripted activities. “Employed,” as the term is used in this definition, requires at least one hour of total appearance-time on camera in a program. Reality programming encompasses whatever media is used to disseminate such programming, such as television (cable and broadcast), movies, DVDs, and the Internet. Because television is currently the most prevalent means of disseminating reality programming, this article draws from many sources addressing reality television, but these sources analogously should apply to all media that transmit reality programming.

with historic ties to the entertainment industry. Part III concludes that the current legal regime is inept at remedying this emerging problem and argues that state law is not the best vehicle to combat the problem. Part IV posits that a national solution is necessary. It canvasses the options, arguing that an express federal statute providing a sliding scale of prohibition for children in reality programming is the best way to address this problem. Finally, Part V maintains that such a statute will not violate the Constitution because it is within Congress' Commerce Clause authority and does not violate parents' due process rights or the First Amendment.

II. REALITY PROGRAMMING HARMS CHILDREN AND SOCIETY

Exploitation of children for amusement and financial gain is detrimental to children and society. It transforms children into commodities whose value is determined by their material worth rather than their intrinsic value. When reality programming is the vehicle for such exploitation, particularly harmful consequences result. Reality programming strips children of their fundamental right to privacy, which is necessary to all humans as the "physical and spiritual locus of individuality and freedom."³³ It places children under a giant microscope, often at the most vulnerable times in their lives, while involving them in ridiculous and often dehumanizing experiences for ratings and profit.³⁴ The use of children in this way is not simply harmful to these children. It also has harmful effects on society. It may lead to the commercialization of other important values; it encourages behavior society should discourage; and it degrades the state of childhood. Because reality programming harms children and society, society must regulate it via the law.³⁵

A. Reality Programming Harms Children

When children become money-making machines—as child entertainers often do—they become commodities, creating a

33. Cf. ROCHELLE GURSTEIN, *THE REPEAL OF RETICENCE* 32 (1996).

34. See Martin Beckford, *United Nations Orders Labour to Stop Reality TV Shows Exploiting Children*, TELEGRAPH, Oct. 2008, available at <http://www.telegraph.co.uk/news/newsttopics/politics/labour/3129928/United-Nations-orders-Labour-to-stop-reality-TV-shows-exploiting-children.html> (last visited Aug. 3, 2009).

35. Society cannot leave the task to private individuals in positions to protect these children—parents and program executives—because of the obvious conflict of interest created by that which they have to gain: fame and fortune. See *infra* note 401 and accompanying text.

“commercialization effect,” which inevitably devalues children in society.³⁶ Attaching monetary value to children and treating them as goods in the marketplace “erodes intangible values, by supplying goods that moral standards define as invaluable for a price in the market . . .”³⁷ Connecting children to a dollar value distorts and confounds their natural human value, thereby creating a greedy “cash nexus”³⁸ between children and the market rather than recognizing their intrinsic value.³⁹ “Prostitution is the prime example of a value (sexual relationship-emotional concern) negated by price.”⁴⁰ Commercialization also interferes with loving parenting because “true parental love [can] only exist if the child [is] defined exclusively as an object of sentiment and not as an agent of production.”⁴¹

This harm is confirmed by some famous examples of commercialized child entertainers.⁴² “Shirley Temple supported a household of twelve, including her parents, throughout her film career. When that career wound to a close, her only assets were a few thousand dollars and the deed to her dollhouse in the back yard of her parents’ Beverly Hills home.”⁴³ *Home Alone* star Macaulay Culkin was the primary source of income for his parents for years.⁴⁴ Gary Coleman of *Diff’rent Strokes* had to sue his parents to recoup millions of dollars of his earnings.⁴⁵

Child actors do not have a monopoly on commodification. Other children have been sold for public amusement simply because they attracted public interest. For example, in the 1930s, the birth of five

36. See ZELIZER, *supra* note 1, at 20 (internal citations omitted). A “commercialization effect” occurs where a product or activity is supplied commercially. *Id.* Commercial availability diminishes the quality of a product or service by making it available for a price. *Id.* Combining the home with money turns the family into another commercial setting. See *id.* at 213.

37. *Id.* at 20 (internal quotations omitted).

38. See *id.* (internal quotations omitted).

39. See *id.* “[P]ricing necessarily destroys value; the unlimited reach of the market is accepted even by its severest critics.” *Id.* at 21. It should be impossible to calculate the monetary value of a child because a child is “something precious beyond all money standard[s].” *Id.* at 57 (internal quotations omitted).

40. *Id.* at 20.

41. See *id.* at 72.

42. See Marc R. Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, 32 BEVERLY HILLS B. ASS’N J. 21, 22-23 (1997).

43. *Id.* at 22. “Shirley Temple’s mother was paid \$500 a week for managing her daughter, while Mr. Temple received a 10 percent commission as Shirley’s agent.” ZELIZER, *supra* note 1, at 111.

44. See Staenberg & Stuart, *supra* note 42, at 22.

45. *Id.* at 23.

identical girls was an event so rare that it made global news.⁴⁶ The Dionne quintuplets “immediately became international celebrities.”⁴⁷ The parents were poor farmers who already had five other children, so to make ends meet, they negotiated a deal to exhibit the babies at a fair.⁴⁸ Claiming a desire to protect the children, the Canadian government took protective custody of the babies.⁴⁹ Despite these supposedly good intentions, however, the government quickly “put the Dionne quintuplets on display as a tourist attraction.”⁵⁰ “Thousands flocked to ‘Quintland’ to watch the twice daily showings of the Dionne babies.”⁵¹ The girls lived in Quintland for the first nine years of their lives, unaware that they were generating millions.⁵² Souvenir shops opened to sell quintuplet-inspired merchandise, and the girls were even featured on various product packaging “from corn syrup to shampoo.”⁵³ “The quintuplets were turned into virtual money machines before they were old enough to count.” All the while, they were miserable as their millions were spent on cars for their father and a mansion for their family.⁵⁴ Their parents coerced them to sign away all of their earnings.⁵⁵

Today, the three surviving Dionne children, now penniless, reflect on their past with sorrow.⁵⁶ They plead to parents of multiples, like the Gosselins, to “[p]lease learn from the mistakes of [the] past,” and do not market children for public consumption.⁵⁷ The Dionne children are the precursors to child reality stars, like the Gosselin children, whose fate is likely to be equally dismal.

The dreary fate of the Dionnes is not attributable solely to the fact that they did not profit from their celebrity. Of greater significance is that their privacy was sold during childhood, a very vulnerable time in life. The need for privacy, which creates a sanctuary over a protected sphere of one’s life, is inherent in the human condition.⁵⁸ Humans need

46. Primetime Live, Silvia Chase et. al., *Once Upon a Time*, (ABC television broadcast Nov. 26, 1997).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See GURSTEIN, supra* note 33, at 9-10. Indeed, the need for privacy has been present for time immemorial. *See id.*

a secure, private realm in which to cultivate their thoughts, feelings, opinions, and affairs.⁵⁹ In this space, “a person reveals and realizes his or her authentic self.”⁶⁰ Freedom over this space enables each person to decide how much or how little she wants to reveal to her community.⁶¹ Without such a space, the life is constantly lived in the presence of others, which “provide[s] not so much the occasion for freedom as the opportunity to enact already scripted roles.”⁶² According to the German sociologist, Georg Simmel, such exposure destroys the individual’s personality value.⁶³

Because of the importance of privacy to self-actualization, societies have generally maintained boundaries between private and public spheres.⁶⁴ According to Justice Brandeis and Samuel Warren, a sphere of privacy is essential, particularly in the complex life of modern society.⁶⁵ Familial love or other forms of intimacy cannot quench this need for individual privacy.⁶⁶ It is necessary in its own right. Justice Brandeis declared the right to privacy “the most comprehensive of rights and the right most valued by civilized men.”⁶⁷

Though reality programming is a relatively recent phenomenon, enriching oneself by eviscerating the privacy of others is not.⁶⁸ During the late 1800s, “invasive and sensational” journalism aroused severe criticism for its “flagrant disregard of privacy.”⁶⁹ Controversy swirled regarding the “proper role of the free press in a democratic society” with many maintaining that the proper role of the media was to promote knowledge, educate, mold public opinion, and discuss issues “concerning the public good.”⁷⁰ Many “were alarmed by the proliferation and popularity of papers devoted only to boosting their circulation by any available means” at the expense of private rights and public well-being.⁷¹ Empirical evidence was offered showing that

59. *See id.* at 18.

60. *Id.*

61. *See id.*

62. *See id.*

63. *Id.* at 37 (internal quotations omitted).

64. *See id.* at 12-13.

65. *See id.* at 19.

66. *See id.* at 28-29.

67. *Id.* at 13.

68. *See id.* at 33-35.

69. *Id.* at 35.

70. *Id.* at 34.

71. *Id.* at 34-35.

journalism had deteriorated into “gossip-mongering,”⁷² which was poetically said to “pluck[] off the roof, and pull[] down the walls and sheltering partitions and wantonly lay[] bare all defilement and consuming lust of poor human nature.”⁷³ This critique equally applies to modern-day reality programming.

Reality programming strips individuals of privacy at a time in their lives when they are most vulnerable: childhood. It exposes children’s home lives, breaches their right to privacy, showcases their emotional responses to life’s stressors, and perverts all of this to satisfy some producer’s vision of “good television.”⁷⁴ This is inherently harmful.⁷⁵ Even the United Nations has issued a highly critical report directing the British government to regulate the exploitation of children by reality programming.⁷⁶ The report expressed concern that “children’s appearance in TV reality shows may constitute an unlawful interference with their privacy.”⁷⁷

In place of privacy, children in reality programming receive nationally televised personas, which do not always depict them in a positive light.⁷⁸ Programs often highlight children’s deficiencies for entertainment purposes.⁷⁹ “Their worst childhood moments, their fits, their tantrums have been immortalized. If their parents’ marriage ends in divorce, there’s a permanent record to revisit when they grow up.”⁸⁰ Children encounter many complex emotions for the first time, and cameras should not focus on them while they experience these emotions,⁸¹ or they may grow up regretting the negative attention.⁸²

72. *Id.* at 34. Journalism techniques “had become so brazen that Justice Louis Brandeis and Samuel Warren felt compelled to do something—hence their famous formulation of ‘The Right to Privacy,’ published in the Harvard Law Review (1890),” which marked “the first sustained effort to control prying journalists legally.” *Id.* at 33-34.

73. *Id.* at 36 (quoting a journalism critic).

74. See Laura Schlessinger, *Reality TV is Child Abuse, John & Kate Plus 8*, Oct. 25, 2004, <http://archive.newsmag.com/archives/articles/2004/10/25/161525.shtml> (last visited Feb. 28, 2010).

75. See *id.*

76. Beckford, *supra* note 34.

77. *Id.* (quoting report).

78. Brian Lowry, *In Reality’s New Wrinkles, the Kids Aren’t All Right*, VARIETY, May 28, 2007, at Television 13.

79. Maria Elena Fernandez, *Is Child Exploitation Legal in “Kid Nation”?: CBS Faces Barrage of Questions on a Reality Show About Children Fending for Themselves*, L.A. TIMES, Aug. 17, 2007, at E1.

80. Sultan, *supra* note 13, at L9.

81. See Starr & Li, *supra* note 15, at 7. “While [reality star children’s] parents opt to air their every move on TV, the tots have no choice in how they’re portrayed. From dirty diapers to temper tantrums, their most embarrassing moments are caught on camera.” Salamone, *supra* note 17, at 22.

82. See Fernandez, *supra* note 79, at E1.

Children may inadvertently fuel the negativity because they feel pressured to entertain, which further distorts their behavior.⁸³

Self-interested producers contribute to this problem by encouraging reality stars to behave more dramatically,⁸⁴ while editors splice footage to create characters that hold the audience's attention and make good programming.⁸⁵ "As reality producers have been forced to reach further to invent something new or exciting, many shows have apparently left reality behind."⁸⁶ "Producers have admitted to writing scenarios that [reality] contestants are asked to carry out. And contestants have revealed that they work long hours and are often asked to do different takes of scenes to make them more interesting or controversial."⁸⁷ Producers direct children's actions, even coaching them to utter specific lines.⁸⁸ In this environment, poor "character" depictions are likely,⁸⁹

83. Schlessinger, *supra* note 74.

84. Reality television "has long thrived on conflict." See Barney, *supra* note 11. CBS's preview for its show *Kid Nation*, see *infra* p. 14, enticed with promises of conflict and drama, much of which was manufactured by producers. See Morning Edition: "*Kid Nation*" Raises Controversy Ahead of Air (NPR radio broadcast Aug. 3, 2007) [hereinafter NPR Broadcast]; Peter Sheridan, *Is This the Most Disturbing TV Show Yet?* UK FIRST ED., Sept 22, 2007, at 32. Reality television parents contribute to the negative images. "[They] seem to go out of their way to make their kids uncomfortable" and embarrassed. Salamone, *supra* note 17, at 22.

85. See Tara Brenner, Note, A "Quizzical" Look into the Need for Reality Television Show Regulation, 22 CARDOZO ARTS & ENT. L. J. 873, 873-74 (2005); Maria Elena Fernandez, "*Kid Nation*" Parents Speak Out: Though Bound by Confidentiality Pact, They Tell Advocacy Groups of Concerns That Children Were Fed Lines, L.A. TIMES, Aug. 31, 2007, at E1. "It's not unusual for [reality] shows to make sure they have all the footage they might ever need to cut and paste the story line they want to create because they're creating entertainment." *Id.*; Marjorie Cortez, *Are "Reality" TV Stars Ready for Personal Scrutiny?*, DESERET MORNING NEWS, June 2, 2009 ("What viewers typically see on 'reality' television programs is the one minute of someone's day when . . . the subjects of a show reacts [sic] poorly to a certain situation. It's all in the editing. We may see the best of someone, but it's more likely we'll see the worst."). "A show is an entertainment, a world of artifice and fantasy carefully staged to produce a particular series of effects so that the audience is left laughing or crying or stupefied." NEIL POSTMAN, DISAPPEARANCE OF CHILDHOOD 107 (Vintage Books, Random House, Inc. 1994) (1982). Almost everything on television is turned into a story with its participants as "personalities" and "entertainers" who are "surrounded by interesting things to look at." *Id.* at 114.

86. Edward Wyatt, *A CBS Reality Show Draws a Claim of Possible Child Abuse*, N.Y. TIMES, Aug. 18, 2007, at B7.

87. Maria Elena Fernandez, "*Kid Nation*" Puts Hollywood Labor Tension into Sharp Focus: Child Welfare Concerns Add to Union Disputes over Reality Shows, L.A. TIMES, Aug. 29, 2007, at A1. In the show, *Kid Nation*, see *infra* p. 14, the "only adults within miles were cameramen and producers, who did nothing to stop the mayhem [that erupted between kids] and often encouraged it." Sheridan, *supra* note 84, at 32 (noting that much drama is manufactured and scenarios are orchestrated to create confrontations).

88. Fernandez, *supra* note 85, at E1.

89. On *Kid Nation*, see *infra* p. 14, kids competed against each other each week in contests designed to exacerbate rifts among them and cause conflict. See Sheridan, *supra* note 84, at 32. Parents, many of whom may be unfamiliar with the entertainment industry, may not realize that this

which may have a lasting impact on children's self images and public personas.

It may also have a lasting impact on childhood, which is drastically cut short as a result of pressure to attract and retain an audience. To maintain interest, reality participants must conform to their audience's notions of how they should behave.⁹⁰ "Most people no longer understand and want the traditional, idealized model of the child because that model cannot be supported by their experience or imagination."⁹¹ This means children in reality programming may be forced to act more like adults thereby losing the opportunity to experience childhood fully.⁹²

The pressure to create hit shows also affects the shows' agendas, exposing children to increasingly outlandish scenarios. As competition in the reality market surges, executives have become desperate to distinguish their shows from the rest of the pack.⁹³ "[E]xecutives have begun an all-out race to the bottom in an attempt to lure viewers and the precious advertising dollars they represent."⁹⁴ Each reality program must entice more than the last, or else risk fading into oblivion.⁹⁵ "On this slippery slope, boundaries are continually tested, as shock value in today's media-saturated climate is short-lived. Words such as 'extreme' and 'outrageous' have become a critical part of the television advertising lexicon."⁹⁶ As a result, reality programs increasingly feature "racier and more extreme premises,"⁹⁷ and producers engage in unethical behavior to maximize ratings.⁹⁸

will occur when they give permission for their children to participate in reality programming. The parents of *Kid Nation* participants only realized post-filming that their "children were on assignment to fulfill a producer's creative impulses" rather than appear in a documentary. Fernandez, *supra* note 85, at E1 (internal quotations omitted). It is not clear, however, whether parents who are fully informed would abandon their hopes of fame and fortune and prevent their children from participating.

90. Cf. POSTMAN, *supra* note 85, at 126. "Programs display what people understand and want or they are canceled." *Id.*

91. *Id.*

92. *Id.* See Sheridan, *supra* note 84, at 32.

93. Ugolini, *supra* note 16, at 69.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. See Brenner, *supra* note 85, at 873-74; Schlessinger, *supra* note 74. Though "reality" implies unscripted programming, "the situations and premises are contrived, with rewards (so-called 'celebrity' and money) for outrageousness, as that is what attracts media attention, therefore an audience, therefore, profits." Schlessinger, *supra* note 74.

Attempting to capitalize on the “voyeuristic allure of family dynamics,” numerous reality shows have continued to push the envelope.⁹⁹ “The newest wave, inevitably, seeks to one-up [its] predecessors, from ‘Kid Nation’¹⁰⁰ to NBC’s British import ‘Baby Borrowers,’ which hinges on having parents ‘loan’ their baby to a teenage couple so the youths can experience what parenting is really like.”¹⁰¹ Such shows are “only the latest program[s] to use kids as fodder for fun and profit, which doesn’t make the trend any less disturbing.”¹⁰²

Many of these outlandish concepts are specifically designed to push boundaries, which attracts criticism, creates curiosity, garners media attention, and yields higher ratings.¹⁰³ A CBS executive responsible for *Kid Nation* has freely admitted these intentions.¹⁰⁴ He thought the show “could be a way to try to get some attention on a broadcast level for a new kind of show, one that really put young kids to the test.”¹⁰⁵

The 2007 reality show¹⁰⁶ definitely “put young kids to the test.”¹⁰⁷ For 40 days, “CBS sent 40 children, ages 8 to 15, to a former ghost town in New Mexico to build a society from scratch. With no access to their parents, not even by telephone, the children set up their own government, laws, and society in front of reality television cameras.”¹⁰⁸ Of the forty children, twelve were age 10 or younger and only one was 15.¹⁰⁹

In a capitalist country where money and thus ratings are king, where will it stop? As exposure increases, so does the public’s frenetic appetite for more exposure.¹¹⁰ The more reality programming panders to this craving, “the more insatiable [the] craving for something yet more vicious in taste.”¹¹¹ Constant exposure breeds familiarity, “until from toleration we go to commission of what at first we detested.”¹¹² What will future programming bring: “‘Zygote Hotel?’ ‘Feral Child

99. Lowry, *supra* note 78, at Television 13.

100. *See infra* p. 14.

101. Lowry, *supra* note 78, at Television 13.

102. *Id.*

103. *Id.*

104. Fernandez, *supra* note 79, at E1.

105. *Id.*

106. Lowry, *supra* note 78, at Television 13.

107. Fernandez, *supra* note 79, at E1.

108. *Id.*

109. *Id.*

110. GURSTEIN, *supra* note 33, at 52.

111. *Id.*

112. *Id.* at 51 (internal quotations omitted).

Island?”¹¹³ Habituation to such programs “dull[s] people’s judgment” until they “eventually lose the capacity to recognize improprieties.”¹¹⁴ Each program thus emboldens the next to go further, exposing participants to even more outrageous and dangerous experiences.¹¹⁵

This race to the bottom has caused some to raise the question: who would let their kids participate in such programs?¹¹⁶ This query is particularly appropriate considering that the contracts parents sign authorizing their children to participate in such shows may even disclose the likely harm. For instance, the *Kid Nation* contract characterized the show as “inherently dangerous,” providing that it “could expose children to . . . uncontrolled hazards and conditions that may cause serious bodily injury, illness or death,” and required that parents waive all legal claims if their children died, were severely injured, or contracted sexually transmitted diseases while filming.¹¹⁷

What sort of individuals would expose their children to such risks? As one commentator astutely answered, “stage moms,” “pageant pushers,” and those who would eagerly degrade and abuse *themselves* to earn a few moments of fame (in other words, people who eat bugs for money).¹¹⁸ Such parents, however, may not be the only ones willing to sacrifice their children to the show-business gods. “Fame is a powerful ruler,” says Matthew Smith, chairman of the communications department at Wittenberg University and editor of a book on reality television.¹¹⁹ “There’s a societal structure that we’ve built, in part thanks to television, that says this is the thing you want, desire, and aim for. That’s a powerful lure for individuals in our society.”¹²⁰

Parents are thus lulled into complacency with promises of fame and money that may quickly blind them to the best interests of their

113. Lowry, *supra* note 78, at Television 13.

114. GURSTEIN, *supra* note 33, at 51.

115. Lowry, *supra* note 78, at Television 13. This is in part because of the nature of television, which must have programming to occupy its around-the-clock presence. See POSTMAN, *supra* note 85, at 82-83. Television constantly needs new material, and it “creates an insatiable need in its audience for novelty and public disclosure . . .” *Id.* at 83.

116. Lowry, *supra* note 78, at Television 13.

117. Sheridan, *supra* note 84, at 32; Lisa de Moraes, “*Kid Nation*” *Borders Open to a Flood of Bad Publicity*, WASH. POST, Aug. 25, 2007, at C07.

118. Lowry, *supra* note 78, at Television 13; Sheridan, *supra* note 84, at 32. Former child star Paul Peterson, who is now a child-rights activist, knows of parents who fund breast augmentations for their fourteen-year-old girls so the girls can compete with eighteen-year-olds for jobs in the entertainment industry. See Staenberg & Stuart, *supra* note 42, at 22.

119. Fernandez, *supra* note 79, at E1.

120. *Id.*

children.¹²¹ So blinded, these parents tend to disregard the very real effect that participating in these shows has on their children.¹²² Reality programs place children in emotional situations that have a lasting impact on their psyches.¹²³ One psychiatrist, commenting on “Kid Nation,” forecast that psychological scars will long endure for the child participants.¹²⁴ “The show should be made to pay for the years of psychotherapy the kids will need to cope with their experience and the knowledge that their parents pimped them to be on TV for the thrill of vicarious fame.”¹²⁵ Another psychologist has explained that such children performers may suffer serious long-term effects, such as anxiety, depression, eating disorders, and even suicidal tendencies.¹²⁶

The invasive journalism of the late 1800s caused similar deleterious psychological consequences.¹²⁷ One of its most devastating impacts was said to be “the psychic damage visited upon the subject of the story.”¹²⁸ Justice Louis Brandeis and Samuel Warren argued that such damage from invasions of privacy “subjected a person to mental pain and distress far greater than could be inflicted by mere bodily injury.”¹²⁹

Displaying the intimate details of one’s life disgraces the victim by trivializing the meaning of those details.¹³⁰ The events in life that deserve human dignity become cheapened and colloquialized.¹³¹ A child caught up in reality programming’s scrutiny will have her most intimate moments—potty training, coming to terms with her parents’ divorce, grappling with a sibling’s illness—stripped of meaningful life experience and reduced to segments of entertainment interrupted by commercials advertising Big Macs and SUVs. “What would

121. *Id.*

122. *See id.*

123. Lowry, *supra* note 78, at Television 13.

124. Sheridan, *supra* note 84, at 32.

125. *Id.* (quoting Beverly Hills psychiatrist, Dr. Carole Lieberman).

126. Staenberg & Stuart, *supra* note 42, at 22.

127. *See* GURSTEIN, *supra* note 33, at 36.

128. *Id.*

129. *Id.* (internal quotations omitted). In addition to mental distress, these children may also suffer collateral physical injuries. For example, in *Kid Nation*, a young girl was burned with hot grease while cooking without parental supervision, and four children required medical attention after drinking bleach left in an unmarked soda bottle. Sheridan, *supra* note 84, at 32; Wyatt, *supra* note 86, at B7. Accidents seem likely and predictable when executives expose children to ridiculous situations designed to create drama.

130. GURSTEIN, *supra* note 33, at 43.

131. *Id.* at 57.

undoubtedly be significant and important in private . . . is inconsequential and banal when paraded before strangers.”¹³²

The exposure reality programming brings strips children of valuable anonymity, transforming them from private individuals into one-dimensional characters whom the public believes they know on an intimate level. It “inflicts what is, to many men, the great pain of believing that everybody he meets in the street is perfectly familiar with some folly, or misfortune, or indiscretion, or weakness, which he had previously supposed had never got beyond his domestic circle.”¹³³

The adverse effects that participating in reality programming brings are more harmful to children than to adults because of the vulnerability of childhood. Childhood is a transitory period when character and personality are not yet fixed.¹³⁴ As the Supreme Court has recognized, during this time “juveniles are more vulnerable or susceptible to outside pressures and negative influences,” and they are more susceptible to the psychological damage that flows as a result.¹³⁵

Because of the unique developmental position of children (even those as old as age 16 and 17), they require special protection from the many harms participating in reality programming brings,¹³⁶ including invasion of their privacy and exposure to outrageous situations. Because employing children in reality programming exposes children to real harm and danger, it merits regulation.

B. Reality Programming Harms Society

The consequences of employing children in reality programming are not limited to those children. Such exploitation has broader implications for society.

First, commercializing children creates a slippery slope that may lead to the corrosion of other important values in society.¹³⁷ Commercializing relationships, activities, and people that should have no exchange value leads to moral acceptance of commercialization in general, which may result in the commodification of other aspects of life

132. *Id.* at 43. A related criticism has been cast toward “newspapers’ coverage of weddings: ‘Even the sanctities of domestic life and marriage suffer violence, profane eyes become as familiar with bridal trousseaux as the ladies maids themselves.’” *Id.*

133. *Id.* at 43 (internal quotations omitted).

134. *See Roper v. Simmons*, 543 U.S. 551, 570 (2005).

135. *Id.* at 569.

136. *Cf. id.* at 568-70 (explaining why a 17-year-old who committed a capital crime may not receive the death penalty because it is unconstitutional to inflict this sentence on a juvenile).

137. *See ZELIZER*, *supra* note 1, at 20-21.

that were once beyond the market's reach.¹³⁸ A society that sells its children is a short step away from selling all of its most precious, traditionally non-compensable, values.

Second, reality programming rewards conduct society should deter: the exploitation of children. Like the gossip journalism of the 1800s, reality programming elevates undeserving individuals to public notice, squandering attention on the unworthy, and suggesting that their actions deserve respect.¹³⁹ “[B]y perverting the public judgment, indiscriminate publicity deprives men of real value of their proper place in the public estimation.”¹⁴⁰ By showering fame and fortune on parents who sell their children's privacy to the public, reality programming encourages such behavior.

To take an example of relatively recent significance, Nadya Suleman secured a reality show to exhibit her fourteen children whom she could not afford to support financially.¹⁴¹ Her overnight celebrity status communicates to society that the path to fame and fortune is to have children one cannot afford and then use those children to earn money. This is clearly problematic. Since reality programs tend to televise the most outrageous conduct, they encourage individuals to engage in such conduct, even though this is precisely the type of conduct society should endeavor to prevent.

Finally, reality programming brings another grim consequence unique to this entertainment format: the degradation of childhood.¹⁴² Reality programming routinely exposes the private lives of participants, making their most intimate experiences accessible with the simple click of a remote.¹⁴³ Over time, access desensitizes feelings of shame at viewing such private moments, which have become non-sacred, non-secret, and commonplace.¹⁴⁴

138. *See id.*

139. *See* GURSTEIN, *supra* note 33, at 47-48.

140. *See id.* (internal quotations and alterations omitted).

141. *See Eight's Enough*, *supra* note 30, at 15; *see also* US WEEKLY, *supra* note 3, at 60 (quoting Suleman's lawyer); Starr & Li, *supra* note 15, at 7.

142. *See* Sheridan, *supra* note 84, at 32; Wyatt, *supra* note 86, at B7.

143. *See id.* Because television operates around the clock, it constantly needs new material, thus “television must make use of every existing taboo in the culture” as it runs through available content. POSTMAN, *supra* note 85, at 82. Television creates an insatiable need for novelty and public disclosure, which programs must constantly supply. But they must do so in short segments that “leave little room for squeamishness, selectivity, or even old-fashioned embarrassment.” *Id.* at 81.

144. The elimination of a recognized private sphere in which intimate activities are hidden destroys feelings of shame at exposure to such activities. *Cf. id.* at 16.

Rochelle Gurstein aptly summarizes the consequence of overexposure in her book, *The Repeal of Reticence*.¹⁴⁵ “The price of too frequently and too regularly crossing the ever-shifting border between desire and taboo, curiosity and injunction, is desensitization: what was once shocking becomes commonplace and trivial, what was once obscene becomes banal and dull.”¹⁴⁶

As audiences numb to witnessing formerly private moments, reality program participants numb to revealing such moments. “[E]xposure of peculiarly sensitive, intimate, vulnerable aspects of the self” would normally bring shame.¹⁴⁷ But privacy is the social container for shame.¹⁴⁸ When the lid is removed and privacy destroyed, shame evaporates. The result is a culture without secrets and without shame.

Shame was also absent during the Middle Ages when, among other things, individuals “were not shamed by exposing their own bodily functions to the gaze of others.”¹⁴⁹ As Neil Postman posits in his book, *The Disappearance of Childhood*, this lack of shame was a primary reason childhood was absent: Childhood cannot exist without shame.¹⁵⁰ Postman maintains that “shame rests, in part, on secrets,” which children learn at the appropriate time.¹⁵¹ Reality programming exposes all secrets to anyone interested in watching, thereby fostering a culture without privacy, secrets, or shame. In such a culture, childhood disappears.¹⁵²

To prevent this and the many other deleterious effects discussed here, the commercialization of children through reality programming must end. The current legal landscape, however, does not adequately provide the needed protection.

145. GURSTEIN, *supra* note 33, at 52.

146. *Id.*

147. *See id.* at 11.

148. *Id.*

149. POSTMAN, *supra* note 85, at 16. “In the medieval world, childhood [was], in a word, invisible.” *Id.* at 18.

150. *See id.* at 9, 115-18; *see also* COLIN HEYWOOD, A HISTORY OF CHILDHOOD 11 (2001) (noting that in medieval civilization, young people were perceived as small adults, and there was no transition period between infancy and adulthood). Respect for privacy and personal modesty were also absent. *See* GURSTEIN, *supra* note 33 at 18.

151. *See* POSTMAN, *supra* note 85, at 15. According to Postman, one of the primary differences between childhood and adulthood is that adults know secrets about life that children do not learn until they are sufficiently mature. *Id.*

152. *See generally id.* Childhood is already disappearing at “dazzling speed.” *Id.* at xii. According to Postman, further evidence of the disappearance of childhood is the lack of children depicted on television. *See id.* at 122-23. Though young people appear on television, they are given the attributes and characteristics of adults. *See id.* at 123-24. A modern-day, 10-year-old Shirley Temple would replace her childish songs with rock songs and would require a boyfriend. *Id.* at 123.

III. CURRENT LABOR LAWS ARE INADEQUATE

The use of children in reality programming involves employment, which implicates labor laws. Neither the relevant federal labor law—the Fair Labor Standards Act (“FLSA”)—nor relevant state laws sufficiently protect children in reality programming. In fact, an exemption in the FLSA prevents it from applying to these children entirely. While state laws vary, the extent of their protection for children in reality programming is generally unclear. And to the extent they do apply to these children, they do not provide enough protection to ensure that these children do not suffer psychological wounds from the sale of their privacy.

Further, state laws are insufficient to protect children in reality programming because program executives may evade them by filming in states with more lenient laws, leaving children in some states more vulnerable than in others. The ideal solution to prevent the continued exploitation of children in reality programming is for Congress to enact a federal statute that clearly protects them.¹⁵³

A. *Reality Programming Is Child Labor*

As an introductory matter, it is important to note that when children participate in reality programming, they perform labor properly subject to labor laws. Reality programming employs children (albeit, often through their parents) to provide entertainment. It does so with relatively inexpensive labor costs.¹⁵⁴ It has thus been described as “the sweatshop of the entertainment industry.”¹⁵⁵

The children engaged to provide such entertainment experience their participation as work. The Gosselin children’s aunt and uncle reported that the children “[we]re very aware of the cameras in their home,”¹⁵⁶ and they did not wish to participate in *Jon & Kate*.¹⁵⁷ They often cried because they did not want to be filmed.¹⁵⁸ They were unable

153. Part IV discusses this in more depth.

154. See Fernandez, *supra* note 87, Aug. 29, 2007, at A1.

155. *Id.* (quoting Jeff Hermanson, Assistant Executive Director, Writers Guild of America, West).

156. Staff & Wire Reports, *Adam Lambert Keen on Queen, but Won’t Rock Only*, PITT. POST-GAZETTE, May 28, 2009, at WE-23; see also Editorial, *Protect Children on Reality TV*, TIMES-CALL, June 6, 2009, available at <http://www.timescall.com/editorial/editorial.asp?ID=16468> (last visited June 21, 2009).

157. See Starr & Li, *supra* note 15, at 7.

158. *Id.*

to relax in their own home because the show transformed it into a never-ending workplace.¹⁵⁹

The *Kid Nation* stars understand this.¹⁶⁰ They worked fourteen-hour days without reprieve while filming.¹⁶¹ Many of the children said that the most challenging part of the project was being filmed constantly, even during private moments.¹⁶² One child initially thought the project sounded like a fun adventure until he arrived and realized it was “annoying” work.¹⁶³ These children understand that reality programming employs children to perform work rather than to participate in life experiences captured on tape.

To legitimate the cheap labor, however, producers maintain the contrary, “rely[ing] on the tradition of documentary to make it seem like it’s not exploitation when the only true commitment [producers] have is to turn a profit.”¹⁶⁴ They argue that participants are merely living in front of the cameras and thus, labor laws should not apply.¹⁶⁵

An associate professor of communication studies at the University of Iowa and author of a book on reality television, Mark Andrejevic, thinks this is absurd.¹⁶⁶ “[W]ork means submitting to conditions that are set by employers in order to generate profit for those employers. . . .

159. See Staff & Wire Reports, *supra* note 156, at WE-23; see also Fernandez, *supra* note 87.

160. See Fernandez, *supra* note 79, at E1.

161. Sheridan, *supra* note 84, at 32.

162. Fernandez, *supra* note 79, at E1.

163. *Id.* (internal quotations omitted). Another child confessed that the experience was scary and that he was too young to have participated. Sheridan, *supra* note 84, at 32.

164. Fernandez, *supra* note 87, at A1 (internal quotations omitted); see also Fernandez, *supra* note 85, at E1 (“CBS lawyers maintain that, like all reality show participants, the children [in the reality show *Kid Nation*] were not ‘working’ and that the \$5,000 payment they received [wa]s a ‘stipend’ and not a ‘wage.’”).

“Reality programming,” though similar to “documentary,” should be distinguished. Webster’s dictionary defines “documentary” as programming “based on or re-creating an actual event, era, life story, etc. that purports to be factually accurate and contains no fictional elements.” RANDOM HOUSE, WEBSTER’S UNABRIDGED DICTIONARY 578 (2d Ed. 2001) (1987). To the extent that this definition includes reality programming involving children, this article applies to such programming. This should not materially affect documentaries, however, because this article does not apply to documentaries that use actors to recreate events (as compared to following subjects as they experience life events), see *supra* note 32, and such programs still qualify as documentaries. Further, this article only applies to for-profit programming that employs or pays individuals for their appearance. This leaves room for non-profit documentaries produced for education. Finally, this article does not apply to appearances of children that are less than an hour of total appearance time. See *supra* note 32. This means that a documentary may include a child as necessary where she is an ancillary figure in the story.

165. de Moraes, *supra* note 117, at C07.

166. Fernandez, *supra* note 79, at E1. According to Andrejevic, reality programming has managed a “smooth move” in pretending that it is not work by piggybacking off of documentary filmmaking. *Id.*

[T]he only reason you can say that kids [in reality programming] are not working is because they're not getting paid or are underpaid. In any other industry, this would be called exploitation."¹⁶⁷

Indeed, courts have long agreed that "work" occurs despite no compensation or formal employment.¹⁶⁸ Because employment in reality programming is labor, the government should regulate it as such.

B. *Brief History of Child Labor Laws*

Until the late eighteenth century, children were considered economic assets whose labor was a resource for their parents.¹⁶⁹ Even after that, children remained an important part of the workforce. "As late as 1890, American high schools enrolled only seven percent of the fourteen- through seventeen-year-old population. Along with many much younger children, the other ninety-three percent worked at adult labor, some of them from sunup to sunset in all of [the] great cities."¹⁷⁰

Concerns then emerged over the health of child workers and the conditions of their employment.¹⁷¹ By the early 1900s, children were no longer obligated to contribute to their family's economic welfare.¹⁷² Children's occupation shifted from work to school.¹⁷³ A general "consensus emerged portraying children, in the words of the historian Harry Hendrick, as 'innocent, ignorant, dependent, vulnerable, generally incompetent and in need of protection and discipline.'"¹⁷⁴

167. *Id.* (quoting Andrejevic).

168. *See, e.g.,* *Gabin v. Skyline Cabana Club*, 258 A.2d 6, 9 (N.J. 1969); *Swift v. Wimberly*, 370 S.W.2d 500, 505 (Tenn. Ct. App. 1963). These courts interpreted "work" more broadly than "employment." *See Gabin*, 258 A.2d at 9; *Swift*, 370 S.W.2d at 505.

Acting in a play is work. *See Commonwealth v. Griffith*, 90 N.E. 394, 395 (Mass. 1910) (rejecting narrow meaning of "work" and noting broad dictionary definition that "work" is "effort directed to an end") (quoting Webster's International Dictionary). Acting may also be "employment" even if uncompensated. *See id.* (stating that "employ" means "[t]o use as a servant, agent or representative" (internal quotations omitted)). *Griffith* was a landmark case for holding that acting is work. *See ZELIZER, supra* note 1, at 85.

169. *See* John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1268 (2005).

170. POSTMAN, *supra* note 85, at xii; *see also* HEYWOOD, *supra* note 150, at 121 (explaining that "[d]uring the early modern period, the majority of families sought work for their children as a matter of routine," and that "hostility to child labour is a comparatively recent phenomenon").

171. *See* HEYWOOD, *supra* note 150, at 134-36.

172. *See* Duncan, *supra* note 169, at 1269.

173. HEYWOOD, *supra* note 150, at 155-56.

174. *Id.* at 142-43.

States began enacting child labor laws to protect children.¹⁷⁵ The Federal government followed suit enacting the Fair Labor Standards Act of 1938 (“FLSA”).¹⁷⁶

C. *The FLSA Does Not Protect These Children*

The FLSA¹⁷⁷ governs child labor.¹⁷⁸ Congress enacted the FLSA pursuant to its Commerce Clause power.¹⁷⁹ Though the FLSA governs child labor, it expressly exempts from coverage children employed as “actor[s] or performer[s].”¹⁸⁰

The Secretary of Labor has defined “performer” broadly to include 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 participates in such capacity in the actual presentation of a radio or television program.¹⁸¹

Though cases have not addressed whether children in reality programming fall within this exemption, from the plain language of the definition, it seems clear that they do. They occupy the interest of their audience by relating¹⁸² facts, events, and other matters as they go about their daily lives. Because children in reality programming are likely

175. See Duncan, *supra* note 169, at 1269. State laws “were either poorly enforced or unenforceable.” See HEYWOOD, *supra* note 150, at 142.

176. 29 U.S.C. §§ 201-219 (2006).

177. 29 U.S.C. §§ 201-219 (2006).

178. See 29 U.S.C. § 212 (2006); see also Duncan, *supra* note 169, at 1269-70. The FLSA survived constitutional challenge before the Supreme Court. *Id.* at 1270. Its predecessors had not. See ZELIZER, *supra* note 1, at 65.

179. See 29 U.S.C. §202(b) (2006); see also *United States v. Darby*, 312 U.S. 100, 114 (1941) (“It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.”); *id.* at 115-17 (overturning *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which held that “Congress was without power to exclude the products of child labor from interstate commerce”); Rachelle Propson, Note, *A Call for Statutory Regulation of Elite Child Athletes*, 41 WAYNE L. REV. 1773, 1788 (1995).

180. 29 U.S.C. § 213(c)(1)(C)(3) (2006) (“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.”).

181. 29 C.F.R. § 570.125 (2009); see also 22A FED. PROC. L. ED. § 52:1619 (Sept. 2008).

182. Webster’s dictionary defines “relating” as “to give an account of (an event, circumstance, etc.).” RANDOM HOUSE, *supra* note 164, at 1626.

“performers” within the meaning of the FLSA, they are exempt from its protection.¹⁸³

This is unsettling. One wonders whether in 1949 the drafters of this exemption ever contemplated that it might one day apply to children forced to live their real lives on camera.¹⁸⁴ It is doubtful that they did given that they did not actually define “performer” in the exemption.¹⁸⁵ That definition instead comes from a 1951 federal regulation, which borrows the definition from another regulation adopted in 1950 that defines “performer” in an entirely different context than child entertainers.¹⁸⁶

Further, it is doubtful that those who lobbied for an exception to child-labor laws for child actors intended to exempt children in reality programming.¹⁸⁷ This is because defenders of the exemption focused on stage acting.¹⁸⁸ It was urged that the theater, “with its lessons of history, costume, and custom . . . is a liberal education . . . [thus] in going to the stage [the child] is going to school.”¹⁸⁹ The rationale behind this—that children’s work should be limited to enriching activities that nourish the mind, body, soul, and character—guided the determination of which occupations would remain free from child-labor-law prohibition.¹⁹⁰

This rationale, of course, does not apply to children forced to live their actual lives in a televised fishbowl with their real-life heartaches offered as fodder for others’ amusement. It is thus doubtful that those

183. See 29 U.S.C. § 213(e)(1)(C)(3) (2006).

184. See Act of October 26, 1949, ch. 736, 63 Stat. 910, 917-18 (1949) (amending the FLSA to include actor exemption).

185. See *id.*; 29 U.S.C. § 213 (2006).

186. See 29 C.F.R. § 570.125 (2009) (borrowing definition from 29 C.F.R. § 550.2, which defines “performer” for Part 550). Part 550 defines and delimits the term “talent fees” as used in Section 7(e)(3)(c) of the FLSA. See 29 C.F.R. § 550.1 (2009). Section 207(e)(3)(c) of the U.S. Code addresses the maximum hours employees may work. See 29 U.S.C. § 207(e)(3)(c) (2006) (explaining that “regular rate” for determining overtime includes all remuneration for employment except, *inter alia*, talent fees).

187. See ZELIZER, *supra* note 1, at 92-96 (explaining that “[s]upporters of stage work refused to categorize the child actor as child worker” because they believed there was a big difference between the overburdened child sweatshop-factory workers in need of protection and the child stage actors who were given the opportunity to express themselves while receiving experiential education in arts and culture).

188. *Id.* at 93.

189. *Id.* (internal quotations omitted). In the early stages, defense of child acting relied more on economic arguments—that acting was lucrative, non-strenuous work for children. See *id.* Prior to the enactment of the FLSA, the defense gradually shifted to educational terms. See *id.* (providing that economic arguments were only periodically invoked from 1910 to 1912, nearly thirty years before the FLSA’s enactment).

190. See *id.* at 97-99, 112.

who advocated for the exception for child actors intended to include children in reality programming.

Original intent notwithstanding, the plain language of the definition of a “performer” includes children in reality programming. It is, therefore, very likely that the FLSA does not protect these children from the harms caused by participating in reality programming since these children are swept within the FLSA’s exemption for actors and performers.

D. State Laws Are Insufficient

Numerous states also have child labor laws. Unlike the FLSA, many even protect child performers. These laws are insufficient, however, to remedy the unique problems posed by reality programming.

First, state labor laws do not clearly apply to children in reality programming. Three states with important connections to the entertainment industry, California,¹⁹¹ New York,¹⁹² and Florida, have laws that may apply to children in reality programming, as do other states, but the extent of their protection is uncertain. Further, none of the laws examined here provides the degree of protection proposed in this article: a sliding scale of prohibition for children from employment in reality programming.¹⁹³ Such protection is necessary to ensure that children are not exposed to the detrimental psychological consequences caused by the sale of their privacy at vulnerable times in their lives.¹⁹⁴

Finally, even if some states enacted such laws, it would not suffice because producers can evade individual state laws by filming in other states.¹⁹⁵ Unlike traditional entertainment, reality programming typically does not require elaborate sets and studios and may occur anywhere.

191. See Mike Tolleson, *Emancipation of Minor Performers & Athletes*, 71 TEX. BAR J. 740, 741 (2008) (noting that many productions occur in California).

192. See Erika D. Munro, *Under Age, Under Contract, & Under Protected: An Overview of the Administration and Regulation of Contracts with Minors in the Entertainment Industry in New York and California*, 20 COLUM.-VLA J.L. & ARTS 553, 554 (1996) (“California and New York are forerunners in passing legislation that provides for the regulation of the employment of children in the entertainment industry.”).

193. See *infra* Part IV.

194. See *supra* Part II.

195. See Stenberg & Stuart, *supra* note 42, at 30 (“The current mix of statutes applying to child performers is complex, inconsistent and invites such unwelcome activities as forum shopping, excessive travel, and family relocation as parents and studios vie for access to laws that suit their own financial interests.”).

Parents seeking to profit from their children may even move to different states for more favorable laws.¹⁹⁶

Even if all states enacted identical statutes, forum shopping would not end. State statutes are subject to interpretation and enforcement by the judicial and executive branches of the individual states. This fact alone will inevitably create variation among state laws. Specific state laws are therefore insufficient, and a federal statute is necessary to provide uniformity and consistency.¹⁹⁷

1. Major Players: California, New York, and Florida

i. California

California enacted its law covering child performers in 1939 in response to reports that the mother of child star Jackie Coogan spent his entire career earnings.¹⁹⁸ California's law appropriately became known as the "Coogan Law."¹⁹⁹ The Coogan Law is focused primarily on remedying the problem Coogan himself experienced, lost earnings. Although this addresses a harm caused by the exploitation of children (lost profits), it fails to address the many other harms relevant here, including, significantly, privacy lost during childhood.²⁰⁰

The Coogan Law has multiple components. First, it describes the entertainment contracts to which it applies.²⁰¹ One category relevant here covers contracts under which minors agree to sell the story of, or incidents in, their life for use in any entertainment format.²⁰² Children who enter into such contracts have the legal right to their earnings,

196. *See id.* This is admittedly a fairly extreme evasion tactic.

197. To support this position, argued further in Part IV, this Part canvasses various state laws.

198. *See* Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 MCGEORGE L. REV. 201, 202-03 (2000); Staenberg & Stuart, *supra* note 42, at 23. "Jackie Coogan, at age eight, commanded a million dollars plus a percentage of profits for a four-picture contract with Metro." ZELIZER, *supra* note 1, at 111. He sued his parents to recover the four million dollars he had earned while a child actor. *Id.*

199. *See* Christiano, *supra* note 198, at 202; Staenberg & Stuart, *supra* note 42, at 23; *see also* ZELIZER, *supra* note 1, at 111.

200. *See supra* Part II.

201. *See* CAL. FAM. CODE § 6750 (West 2009).

202. *See* CAL. FAM. CODE § 6750(a)(2) (West 2009). It also covers contracts for which minors agree to sell their likeness. *See id.* No California cases appear to address whether the Coogan Law applies to reality programming, but the plain language suggests that it does. *See* Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (stating that where statutory text is plain, the sole function of courts is to enforce its terms unless it would lead to an absurd result); Warner Bros. Pictures v. Brodel, 192 P.2d 949, 954 (Cal. 1948) (analyzing the Coogan Law and recounting "familiar rule of statutory construction that statutes should be given a common sense meaning").

unlike children in other occupations, whose earnings belong to their parents under California law.²⁰³

The Coogan Law also provides that such contracts, though created during a child's minority, cannot be disaffirmed on this basis if a court has pre-approved the contract.²⁰⁴ The parties may petition the court for such approval.²⁰⁵ A minor's parent is considered her guardian ad litem for the proceeding (and any proceeding under the Coogan Law), "unless the court shall determine that appointment of a different individual as guardian ad litem is required in the best interests of the minor."²⁰⁶

Second, the law mandates the creation of a trust for the child entertainer's earnings, into which 15 percent of gross earnings must be set aside for her benefit.²⁰⁷ Absent a court order, no person may withdraw any money from the trust until the beneficiary turns 18 or is emancipated.²⁰⁸ At least one parent or legal guardian is appointed trustee unless the best interests of the child require otherwise.²⁰⁹ Employers must deposit the funds directly into the trust, which the trustee has a continuing duty to manage.²¹⁰ The court maintains jurisdiction over the trust and may at any time upon petition by the parent, legal guardian, or minor (through her guardian ad litem) order amendment or termination of the trust.²¹¹

Though California's Coogan Law is fairly protective of minors, it is rather one-dimensional in its economic focus. It fails to address the

203. See CAL. FAM. CODE § 771(b) (West 2009); CAL. FAM. CODE § 7500(c) (West 2009); see also 32 CAL. JUR. 3D *Fam. Law* § 301 (West 2009); Christiano, *supra* note 198, at 206-07. Sections 771(b) and 7500 both provide that children's earnings are the property of their parents unless they are from a child-performer contract under Section 6750. See CAL. FAM. CODE §§ 771, 7500.

204. CAL. FAM. CODE § 6751(a) (West 2009). Prior to this, children often attempted to use their minor status to void employment contracts, claiming incapacity. Christiano, *supra* note 198, at 203. Employers in the entertainment industry sought to protect themselves from this; the Coogan Law gave them that protection for contracts pre-approved by the court. See *id.* at 203-04.

205. CAL. FAM. CODE § 6751(b) (West 2009).

206. CAL. FAM. CODE § 6751(d) (West 2009).

207. See CAL. FAM. CODE §§ 6752(b)(1), 6753(a) (West 2009). Such a trust is required even if the contract never receives court approval pursuant to Section 6051. See § 6752(d)(1) (West 2009).

208. See CAL. FAM. CODE § 6753(b) (West 2009). Upon turning 18, the beneficiary may remove the funds. *Id.*

209. CAL. FAM. CODE § 6752(b)(2) (West 2009).

210. CAL. FAM. CODE §§ 6752(b)(4) & (6), 6753(d) (West 2009). The trustee must provide the employer with a statement containing the information necessary to make the required deposit. See CAL. FAM. CODE § 6753(c) (West 2009). If the trustee fails to do this within the required time, the employer shall forward the 15 percent to the Actors' Fund of America, which shall become the trustee and hold the funds until the beneficiary reaches majority or is emancipated. See CAL. FAM. CODE § 6752(b)(9)(A), (c) (West 2009). Trustee duties also include providing a yearly accounting in accordance with California's Probate Code. CAL. FAM. CODE § 6752(b)(6) (West 2009).

211. CAL. FAM. CODE § 6752(b)(7) (West 2009).

psychological harm child actors are often forced to endure. Further, it leaves children in other states vulnerable.²¹² As executives move “production sites to less expensive locations outside California, laws of other states will become more important in determining the fate of the child actors.”²¹³ This is especially true for children in reality programming.

ii. New York

New York generally modeled its law after California’s.²¹⁴ Like California, New York’s law is relatively protective of child performers, though it is not entirely clear whether this extends to children in reality programming. Unlike California, the law’s primary focus extends beyond economic protection. Loopholes in the law, however, expose children in reality programming to the many harms that result from the sale of their privacy.²¹⁵

Under New York law Section 35.01, it is generally unlawful to use or employ anyone under 16 for, *inter alia*, performing in a theatrical performance or in a television program, or in connection with the making of a motion picture.²¹⁶ It is also unlawful for parents to permit such employment.²¹⁷ The provision states, however, that it does not apply when the child is in a private home.²¹⁸

Notwithstanding Section 35.01, it is legal to employ a child performer who has first obtained a child-performer permit.²¹⁹ The permit application must be made every six months and must include evidence that the child is maintaining satisfactory academic

212. Christiano, *supra* note 198, at 209.

213. *Id.*

214. *See* Munro, *supra* note 192, at 554.

215. These harms are set out in Part II, *supra*.

216. N.Y. ARTS & CULT. AFF. LAW § 35.01(1)(a), (b) (McKinney 2009). Violation of Section 35.01 is a misdemeanor. N.Y. ARTS & CULT. AFF. LAW § 35.01(5) (McKinney 2009).

217. N.Y. ARTS & CULT. AFF. LAW § 35.01(1) (McKinney 2009).

218. *See* N.Y. ARTS & CULT. AFF. LAW § 35.01(2) (McKinney 2009). The statute does not elaborate on the implications of this. *See id.* It seems illogical that someone can turn their home into a studio, employ children, and then claim the exemption applies because the studio is located in a “private home,” but the statute seems to permit this. *See id.*

For performances in radio or television programs, the statute also does not apply where the children broadcast from a “school, church, academy, museum, library or other religious, civic or educational institution, or for not more than two hours a week from the studios of a regularly licensed broadcasting company,” where the performance is “of a nonprofessional character and occurs during hours when attendance for instruction is not required in accordance with the education law.” *Id.*

219. N.Y. LAB. LAW § 151(1)(a) (McKinney 2009); *see also* N.Y. ARTS & CULT. AFF. LAW § 35.01(3) (McKinney 2009).

performance.²²⁰ A permit 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.”²²¹

New York law also protects children who obtain court approval of contracts in which they (or their parents acting on their behalf) agree to render services as actors, dancers, musicians, vocalists, other performing artists, or participants in professional sports.²²² Such court approval also prevents children from disaffirming contracts because of infancy.²²³

During the approval process, the court sets an amount of earnings to be set aside in the best interests of the child.²²⁴ The child’s guardian holds the earnings for the child until she reaches majority or until further court order.²²⁵ The child must personally participate in the proceedings, and the court makes such orders necessary in the child’s best interest.²²⁶ If while performing under the contract, the child’s well-being is impaired as a result, the child, her parent, or a guardian (including one the court appoints for this purpose) may petition the court to revoke its approval.²²⁷

Additionally, for contracts pursuant to which child performers agree to use of their likeness or story of (or incidents in) their life, employers must deposit 15 percent of the gross earnings into a trust

220. N.Y. LAB. LAW § 151(1)(c)(iii) (McKinney 2009).

221. N.Y. LAB. LAW § 151(1)(e) (McKinney 2009).

222. See N.Y. ARTS & CULT. AFF. LAW § 35.03(1) (McKinney 2009).

223. See N.Y. ARTS & CULT. AFF. LAW § 35.03(1) (McKinney 2009); see also 21 CARMODY-WAIT 2D § 124:71 (2009).

[T]he major reason for [the statute’s] enactment was to provide a degree of certainty for parties contracting with infants in the entertainment industry so that the validity of such contracts would not be rendered doubtful or subject to subsequent litigation concerning reasonableness, after a considerable expenditure of efforts in part or full performance of the contract.

Id. The statute also provides that the child may not claim that her parent or guardian lacked the authority to commit her to such a contract. N.Y. ARTS & CULT. AFF. LAW § 35.03(1) (McKinney 2009).

224. N.Y. ARTS & CULT. AFF. LAW § 35.03(3)(b) (McKinney 2009). In setting the amount, the court may also consider the financial circumstances of the parents. *Id.* The court may modify the amount upon subsequent application. *Id.* The court may withhold approval of the contract if the parents who are entitled to their child’s earnings do not consent to setting aside the earnings. See N.Y. ARTS & CULT. AFF. LAW § 35.03(3)(a) (McKinney 2009).

225. See N.Y. ARTS & CULT. AFF. LAW § 35.03(7), (3)(a) (McKinney 2009); see also 21 CARMODY-WAIT 2D § 124:72 (2009).

226. N.Y. ARTS & CULT. AFF. LAW § 35.03(8)(a) (McKinney 2009).

227. See N.Y. ARTS & CULT. AFF. LAW § 35.03(2)(e) (McKinney 2009). To prevent revocation, the parties may agree to court-approved modification of the contract. *Id.*

account, which the child's guardian creates.²²⁸ A parent or legal guardian must show maintenance of a trust account for renewal of the performer permit.²²⁹ The child's parent or guardian ad litem may request that the employer transfer more than 15 percent.²³⁰ Parents or legal guardians may serve as trust custodians, but if the account balance reaches \$250,000.00, a trust company must take over.²³¹

It is not entirely clear whether New York's law fully protects children in reality programming. First, the general prohibition of Section 35.01 does not apply to private homes. Shows filmed in homes (*Jon & Kate* often featured the children in their home,²³² as did the *Osbournes* and *Hogan Knows Best*) likely fall within this exemption and thus evade the legal protections intended for children. Though this seems an odd result, it appears sanctioned by the statute.²³³

Further, the permitting requirements apply only to "child performers," but it is not clear whether this includes participants in reality programming, though it may. A "child performer" is one engaged in artistic or creative services.²³⁴ Artistic or creative services include "services as an actor, actress . . . or other performer or entertainer."²³⁵ "[O]ther performer or entertainer" arguably may include children in reality programming. Though they are not performing, they are entertaining an audience. Few cases have interpreted this provision, so it is difficult to guarantee that a court would apply it in this fashion, though it seems likely.

The contract-approval provision also does not clearly include children performing services in reality programming.²³⁶ That provision applies to a child performing services "as an actor, actress, dancer, musician, vocalist or other performing artist, or as a participant or player

228. N.Y. EST. POWERS & TRUSTS LAW § 7-7.1 (McKinney 2009). When the child applies for her performer permit, she is notified of this. N.Y. LAB. LAW § 151(1)(d). Apart from this, parents are otherwise generally entitled to their minor child's earnings per New York law. See Scheller v. Bowery Savings Bank, 630 N.Y.S.2d 62, 64 (App. Div. 1995); Schonberger v. Culbertson, 247 N.Y.S. 180, 182 (App. Div. 1931).

229. N.Y. LAB. LAW § 151(4)(a) (McKinney 2009).

230. N.Y. EST. POWERS & TRUSTS LAW § 7-7.1(2)(b) (McKinney 2009).

231. *Id.*

232. See *Multiple Challenges: Parents of Twins, Triplets, Quadruplets & More Need to Strike a Balance*, PITT. POST-GAZETTE, June 29, 2009, at Lifestyle C-1 (noting that *Jon & Kate* is filmed at the family's home).

233. See *supra* note 218 and accompanying text.

234. N.Y. LAB. LAW § 150(1), (2) (McKinney 2009).

235. N.Y. LAB. LAW § 150(1) N.Y. LAB. LAW § 151(4)(a).

236. See N.Y. ARTS & CULT. AFF. LAW § 35.03(1) (McKinney 2009).

in professional sports . . .”²³⁷ Because reality programming purports simply to film children as they live life, it is not clear whether such children constitute “performing artists.”

Further confusing matters, the provision addressing trust accounts, which is not subject to the definition of “child performer” found in the permitting provision, should clearly apply to children in reality programming.²³⁸ That provision extends to contracts for children’s likenesses or stories of their lives, which squarely cover reality programming.²³⁹

Perhaps only the trust requirement protects children in reality programming while the other provisions of New York law do not. Until the New York courts interpret these provisions as applied to children in reality programming, the extent of protection remains unsettled. Although appearing at first blush to offer a prohibition of child performances, the New York statute contains too many loopholes to protect children in reality programming effectively.

iii. Florida

Florida’s law shares similarities with the laws of New York and California. It too provides for judicial approval of certain types of entertainment contracts.²⁴⁰ Of relevance here, it applies to contracts for artistic or creative services, “including, but not limited to, services as an actor, actress . . . or other performing artist.”²⁴¹ It also applies where minors receive compensation for the use of their right of publicity,²⁴² or where they exploit literary, musical, or dramatic properties.²⁴³

Because children in reality programming are not exploiting literary, musical, or dramatic properties in the ordinary sense,²⁴⁴ nor are they providing services as an actor, dancer, musician, vocalist, model, stunt

237. *See id.*

238. *Compare* N.Y. EST. POWERS & TRUSTS LAW § 7-7.1(1)(b) (McKinney 2009) (contained in Article 7 and extending to contracts for children who agree to the use of their likeness or story of their life), *with* N.Y. LAB. LAW § 150(1), (2) (defining “child performer” for Article 4 in a way that does not, on its face, include children living their actual lives on camera).

239. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-7.1(1)(b) (McKinney 2009).

240. *See* FLA. STAT. ANN. § 743.08(1) (West 2009).

241. *See* FLA. STAT. ANN. § 743.08(1)(a) (West 2009).

242. *See* FLA. STAT. ANN. § 743.08(1)(c) (West 2009).

243. *See* FLA. STAT. ANN. § 743.08(1)(d) (West 2009).

244. No Florida cases have applied this provision to children in reality programming. Nor have they defined “dramatic properties.” A definition is similarly absent from the Florida statutes and administrative regulations. It could logically extend to reality programming, but it need not.

person, or conductor,²⁴⁵ the right of publicity provision seems most appropriate here. Upon further examination, however, even the right of publicity provision does not likely protect these children.

According to the statute that provides for judicial approval of these contracts, the scope of the right of publicity is set forth in another Florida statute, Section 540.08.²⁴⁶ Section 540.08 explains that the right of publicity extends to one's "name, portrait, photograph, or other likeness."²⁴⁷ Precedent interpreting Section 540.08 shows that this generally will not protect children in reality programming.²⁴⁸

In *Tyne v. Time Warner*, the Florida Supreme Court explains that Section 540.08 only applies when a person's likeness is directly used to promote a product or service.²⁴⁹ According to the court, "the purpose of Section 540.08 is to prevent the use of a person's name or likeness to directly promote a product or service because of the way that the use associates the person's name or personality with something else," not simply because the use is for profit.²⁵⁰ The court explains that to apply Section 540.08 to motion pictures and other expressive works creates a First Amendment problem, and Section 540.08 is limited to pure commercial speech.²⁵¹ It is therefore unlikely that the statute for judicial approval of contracts covers agreements for participation in reality programming, which is not commercial speech.²⁵²

245. This provision also applies to children rendering "other performing artist services." See FLA. STAT. ANN. § 743.08(1)(a) (West 2009). Depending on how this phrase is defined, it could include participating in reality programming. Neither the Florida statutes, nor administrative code, nor case law define this phrase within the meaning of this provision. The meaning of "performing," however suggests it does not include participating in reality programming because participating in reality programming involves portraying one's own life rather than the lives of others. See, e.g., *Harrell v. Diamond A. Entm't, Inc.*, 992 F. Supp. 1343, 1356 (M.D. Fla. 1997) ("A performer presents someone else's words, someone else's melodies, or someone else's choreography."). Because the statute contains the phrase "including, but not limited to," see FLA. STAT. ANN. § 743.08(1)(a) (West 2009), it may still be interpreted to extend to participation in reality programming, but no Florida cases have done so.

246. See FLA. STAT. ANN. § 743.08(1)(c) (West 2009).

247. See FLA. STAT. ANN. § 540.08(1) (West 2009).

248. See, e.g., *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 806-10 (Fla. 2005).

249. See *id.* at 806-08.

250. See *id.*; see also *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1212-13 (M.D. Fla. 2002) (summarizing cases stating same and providing that use of another's identity in an expressive work does not typically violate the statute); *Loft v. Fuller*, 408 So. 2d 619, 622-23 (Fla. Dist. Ct. App. 1981) (explaining that Section 540.08 is "designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher," and thus "the publication is harmful not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates the individual's name or his personality with something else").

251. See *Tyne*, 901 So. 2d at 808-10.

252. See *infra* note 430.

If, however, the right-of-publicity provision applies, a minor, her parents, or any other interested person may petition the court for approval of the contract.²⁵³ The petition shall include a statement regarding the employment and compensation.²⁵⁴ The petition must also include facts known that show that the “contract is reasonable and provident and for the best interests of the minor.”²⁵⁵

At any time after a petition is filed, the court may appoint a guardian ad litem to represent the interests of the minor.²⁵⁶ Further, the court shall appoint a guardian for any contract “where the parent or guardian will receive remuneration or financial gain from the performance of the contract or has any other conflict of interest with the minor”²⁵⁷

If a court approves the contract, the minor may not disaffirm the contract on the ground of infancy, nor may she claim that her guardian lacked authority to contract on her behalf.²⁵⁸ If a contract is approved, all earnings from the contract belong to the minor.²⁵⁹

There are many reasons for which a court will not approve such a contract.²⁶⁰ For instance, it will not approve a contract if federal or state child-labor law prohibits the employment.²⁶¹ The court may also withhold approval until the parents or guardians have filed a guardianship plan providing that a portion of the child’s earnings will be set aside and saved for the child until she reaches majority.²⁶² The court sets this amount in the best interests of the child.²⁶³ A guardian of the property holds the set-aside earnings.²⁶⁴

253. See FLA. STAT. ANN. § 743.09(1)(a) (West 2009).

254. See FLA. STAT. ANN. § 743.09(2)(d) (West 2009).

255. See FLA. STAT. ANN. § 743.09(2)(i) (West 2009). One could use this provision to argue that participation in reality programming is not in the best interests of the minor in any given case. But it is inefficient to argue this in each and every case, and various judges may have different opinions on whether participating in reality programming is in the best interests of minors, so this provision does not provide the uniform protection necessary to prevent harm to children from reality programming.

256. FLA. STAT. ANN. § 743.09(3) (West 2009).

257. See *id.*

258. See FLA. STAT. ANN. § 743.08(3)(a) (West 2009).

259. See FLA. STAT. ANN. § 743.08(3)(b) (West 2009). This is subject to Florida Statute Sections 743.09, 743.095, and chapter 744.

260. See FLA. STAT. ANN. § 743.08(c)-(e) (West 2009).

261. See FLA. STAT. ANN. § 743.08(c) (West 2009).

262. See FLA. STAT. ANN. § 743.095(1)(a) (West 2009).

263. See FLA. STAT. ANN. § 743.095(1)(b) (West 2009). In fixing an amount, the court shall consider the financial circumstances of the parents, the child, and any siblings. *Id.* The amount may be modified upon subsequent application. *Id.*

264. See FLA. STAT. ANN. § 743.095(2)(a) (West 2009). A parent or guardian is not ineligible for appointment as property guardian simply because of an interest in the property as long as the

Once the court approves a contract, it may revoke its approval for many reasons, including that “the physical or mental well-being of the minor is being impaired by the performance thereof . . .”²⁶⁵ The minor, her parents, her guardian, or a guardian ad litem appointed for this purpose may move the court to revoke its approval.²⁶⁶

Florida protects child performers, but it is not certain whether such protection applies to children in reality programming because it is not clear that the statute covers contracts for reality programming. Further, like California and New York, Florida does not prohibit children of certain ages from participating in reality programming, thus it leaves these children exposed to the psychological harms such participation causes.²⁶⁷

2. Other States

Other states also have laws applicable to child performers.²⁶⁸ These vary in scope and purpose.²⁶⁹ Some have intricate laws like California’s Coogan Law.²⁷⁰ As with California, New York, and Florida, the extent to which these states’ laws protect children in reality programming is unsettled.²⁷¹ The laws examined here generally fail to provide the clear

interest is fully disclosed to the court. FLA. STAT. ANN. § 743.095(2)(b) (West 2009). The court may authorize the guardian to use the minor’s property for the care and support of the minor’s parents to the extent necessary as long as it is first used for the minor’s care and support. *See* FLA. STAT. ANN. § 744.397(1) (West 2009). The guardian may also take numerous other actions while fulfilling her role, including establishing a trust with the minor’s funds. *See* FLA. STAT. ANN. § 744.441 (West 2009) (enumerating powers of guardian upon court approval); *see also* FLA. STAT. ANN. § 744.444 (enumerating powers of guardian without court approval).

265. *See* FLA. STAT. ANN. § 743.08(f) (West 2009); *see also supra* note 255.

266. *See* FLA. STAT. ANN. § 743.08(f) (West 2009).

267. *See supra* Part II; *infra* Part IV.B.1.

268. *See, e.g.*, MASS. GEN. LAWS ch. 231, § 85P 1/2 (West 2009); VT. STAT. ANN. tit. 21, § 434 (2009); ALA. CODE § 25-8-60 (2009), *amended by* 2009 Alabama Laws Act 2009-565 (H.B. 144); ARK. CODE ANN. § 11-12-104 (2009); N.D. CENT. CODE § 34-07-01(2009); ALASKA STAT. § 23.10.330(b) (2009); ALASKA ADMIN. CODE tit. 8, §§ 05.300, 05.340 (2009).

269. *See infra* pp. 35-39 and accompanying footnotes.

270. *See, e.g.*, KAN. STAT. ANN. §§ 38-615 - 622 (2009) (covering employment of child entertainers); NEV. REV. STAT. §§ 609.400-609.570 (LexisNexis 2008) (covering contracts for creative or athletic services of minors); N.C. GEN. STAT. §§ 48A-11 – 18 (same); TENN. CODE ANN. §§ 50-5-201 – 222 (2009) (containing “Tennessee Protection of Minor Performers Act”).

271. For example, the extent to which Arkansas law protects children in reality programming is uncertain. Arkansas’s law provides that no child under age sixteen may be employed in the entertainment industry in a role or environment deemed by the Director of the Department of Labor to be hazardous to the health, morals, education, or welfare of the child. *See* ARK. CODE ANN. § 11-12-104(b)(1) (2009). One might use this provision to argue to the Director of the Department of Labor that participating in reality television is hazardous to children. It is not clear whether this would succeed. ARK. ADMIN. CODE. 010 14 001 § 2.300(b) (listing occupations Director deems

and expansive protection needed to protect children from the exploitation and psychological harms attendant to participating in such programming.²⁷²

For example, Vermont's child labor laws appear to provide little protection for child performers, generally, let alone children in reality programming. Vermont law exempts children in television from the

"injurious to the health or morals of children under sixteen," and none comes close to participating in reality television); *cf. also supra* note 255.

The extent to which children in reality programs in North Dakota are protected under North Dakota law is similarly uncertain. For instance, one provision prohibits children under age 14 from working in any occupation subject to a few exceptions. *See* N.D. CENT. CODE § 34-07-01 (2009). One such exception permits children to work in the employment of their parents or guardians with their direct supervision. *See id. But see* *Murphy v. Tivoli Enterprises*, 953 F.2d 354, 355 & n.1 (8th Cir. 1992) (stating that another provision of North Dakota law, Section 34-07-16, was violated when a 15-year-old worked for his father's company, which owned and operated transportable carnival rides, but the court never mentioned Section 34-07-01). For reality shows, like *Jon & Kate*, where children appear beside their parents, this exception would arguably eliminate protection. Another provision of North Dakota law may provide some protection, however. It enables the labor commissioner to issue orders regarding employment of minors. N.D. CENT. CODE § 34-07-20 (2009). The commissioner also may prohibit minors from employment that is dangerous to their health, safety, or welfare. *Id.*; *see also* N.D. CENT. CODE § 34-07-16(13) (2009). One might argue to the commissioner that reality television is dangerous to the children's welfare, thus the commissioner should use his statutory power to prohibit participation. *Cf. supra* note 255. It is unclear whether the commissioner could prohibit this in circumstances where the children are working under their parents' supervision, and thus the explicit statutory exception in Section 34-07-01 applies. *See* N.D. CENT. CODE § 34-07-20 (2009) (providing that any regulation or order issued pursuant to this Section is in addition to the regulations set forth in chapter 34-07). Yet another North Dakota statute may enable children to participate in reality programming. It permits minors to work in "a theater or place of amusement" if a permit is obtained. N.D. CENT. CODE § 34-07-17 (2009). Arguably, reality programming occurs in theaters, though admittedly, not in the traditional sense.

It is also not clear whether Massachusetts's law applies to participation in reality programming, though it seems it may. *See* MASS. GEN. LAWS ch. 231, § 85P 1/2 (a) (West 2009) (prohibiting employment, use, or exhibition of children in the following activities: acting in, or rehearsing for, or performing in a theatrical or musical performance; appearing in a pageant; appearing as a subject for use for, in, or in connection with the making of a motion picture; or rehearsing for or performing in a radio or television broadcast or program). If the programming is a motion picture, it should satisfy this provision because the child stars would certainly qualify as "subject[s]." If the programming is television, however, whether this applies depends on how broadly one defines "performing." Even assuming this provision applies, exceptions eliminate protection in certain circumstances that may strip protection for reality programming. *See* MASS. GEN. LAWS ch. 231, § 85P 1/2 (b) (West 2009) (providing protection shall not apply in numerous instances, including when employment is in a private home). For reality shows filmed in the home, this exception may remove protection. *See supra* note 218 and accompanying text. Another Massachusetts law may also apply to children in reality programming. *See* MASS. GEN. LAWS ch. 149, § 104 (2009). That provision prevents employing children under age fifteen in any public exhibition in any entertainment capacity. *See id.* The text of the provision suggests, however, that it is limited to in-person exhibitions and therefore may not cover reality programming. *See id.* No cases have applied this provision to reality programming.

272. *See supra* Part II.

general protection afforded children in other occupations.²⁷³ Vermont law does protect child performers by requiring that the commissioner of education approve the substance and conditions of the educational programs provided to children during their employment, which may not exceed ninety days during the school year.²⁷⁴ Though this addresses one important concern (education), it is far from comprehensive protection for these children, and it certainly does not address the psychological harms these children face from participating.²⁷⁵ Because Vermont law provides little protection for child performers, children in reality programming are likely to receive similarly scant protection.

The nearby state of Pennsylvania, where *Jon & Kate* was filmed, has labor laws that apply to children,²⁷⁶ but the extent to which they protect children in reality programming remains unclear.²⁷⁷ One provision provides that no child under age 16 “shall be employed or permitted to work in, about, or in connection with, any establishment or in any occupation.”²⁷⁸ This should apply to reality programming. A Pennsylvania court has explained, however, that whether a child is engaged in “work” within the meaning of state labor law depends on the circumstances of the case; there is no universal rule.²⁷⁹ It is thus difficult

273. See VT. STAT. ANN. tit. 21, §§ 432(3) (2009) (requiring that children under age 16 obtain a certificate from a physician stating that they are fit to perform the proposed occupation but enabling child performers to obtain waivers); *id.* § 434 (providing that children under 16 may not work past 9 p.m., but children employed as performers in, *inter alia*, television, motion pictures, or theatrical productions may be employed until midnight or later with approval of parents and labor commissioner); *id.* § 436 (prohibiting children under fourteen from working in gainful employment unless the commissioner of labor approves the occupation, and the employment occurs during non-school hours but expressly excepting television, motion picture, and theatrical actors and performers); see also VT. CODE R. 24 010 009 (2009) (adopting regulations matching federal regulations that accompany the FLSA, including 29 C.F.R. §§ 570.122 and 570.125, which provide that specific exemptions to child labor laws exist for child performers, and “performer” is a broad term including one who entertains or amuses an audience).

274. See VT. STAT. ANN. tit. 21, § 432(4) (2009).

275. See *supra* Part II.

276. See, e.g., 43 PA. STAT. ANN. §§ 42, 48.1 (West 2009).

277. Pennsylvania was among the first states to enact child labor laws, but they were initially poorly enforced. See HEYWOOD, *supra* note 150, at 142.

278. 43 PA. STAT. ANN. § 42 (West 2009). “[E]stablishment” is defined as any place “where work is done for compensation of any kind, to whomever payable,” but not including children employed in “domestic service in private homes.” 43 PA. STAT. ANN. § 41 (West 2009). “[D]omestic service” is not defined. See *id.* “[O]ccupation,” which appears in section 42, is also undefined. See *id.*

279. See *Commonwealth v. McKaig*, 29 Pa. D. & C. 629, 631-32 (1937) (holding that child was not working when she exhibited her skating at amateur skating competition where “no compensation for her exhibition was received by anyone, either directly or indirectly”; and, exhibition occurred in location leased for private purpose). The court found it immaterial that a

to predict whether children simply living life before cameras are working within the meaning of the statute, though arguably they are.²⁸⁰ The Pennsylvania Department of Labor opened investigations to determine whether *Jon & Kate* violated state labor law.²⁸¹

In Georgia, the pertinent statutes expressly exempt children employed as actors or performers from protection.²⁸² The Labor Commissioner must consent for the exemption to apply.²⁸³ The Commissioner considers whether the environment is proper for the minor, whether the conditions of employment are detrimental to the

professional skater appeared in the same program for compensation because child's skating was not linked to his. *Id.* at 633-34.

A Pennsylvania regulation defining "employment" suggests that participating in reality programming is "work." See 34 PA. CODE § 11.1 (2009) ("A minor engaged in a performance shall be deemed employed, if any person, including the performer, his parent or teacher, receives remuneration from the performance or if any performer in the production is paid for performing.").

280. Yet another provision of Pennsylvania law may offer some protection. It authorizes the Department of Labor and Industry to issue special permits for the employment of minors age 7 and older to participate in productions where it is not hazardous to their health or well-being. See 43 PA. STAT. ANN. § 48.1(a) (West 2009); see also 34 PA. CODE § 11.3(c) (2009). One might argue that participating in reality programming is hazardous to children's well-being, and thus a permit should not issue. *Cf. supra* note 255 and accompanying text. For minors under age 7, it seems a permit is not possible, thus the case would turn on whether participating in reality programming constitutes prohibited "work" as discussed above. *But see* 43 PA. STAT. ANN. § 48.1(a.1) (West 2009) (authorizing the Department of Labor and Industry to issue special permits for temporary employment of minors of all ages to participate in motion pictures where certain conditions are satisfied).

281. See Noveck, *supra* note 15, at Lifestyle. The *McKaig* case involving the child ice skater suggests that the Gosselin children were working. In *McKaig*, the court explained that a child's activities may seem like a form of pleasure or play for which she receives no compensation, "yet they may be so linked with commercial channels, as by the sale of the product of [her] labors, that they become work in contemplation of law." *McKaig*, 29 Pa. D. & C. at 632. A State Attorney General's interpretation of *McKaig* supports the conclusion that the children's activities violate state labor law. See Official Opinion No. 78-22, 8 Pa. D. & C.3d 160, 163-65 (1978) (explaining that in *McKaig*, the court was "fearful of the situation where a minor is made an integral part of an adult professional show business performer's act and exploited thereby. The minor, presumably, would view the entire situation as one involving fun or play and not work as adults would understand the concept."). The Attorney General's characterization of the *McKaig* court's concerns apply to the Gosselin children who were an integral part of their parents' television show, even though they may have had some impression that they were simply living life. See also Michael Moore, *Jon & Kate Plus 8 Reality TV Show Faces Child Labor Investigation*, Pennsylvania Labor & Employment Blog, June 1, 2009, <http://www.palaborandemploymentblog.com/2009/06/articles/wage-hour/jon-kate-plus-8-reality-tv-show-faces-child-labor-investigation/> (last visited Feb 15, 2010) ("The Gosselin children play an integral part the show and their roles may be somewhat staged. Furthermore, the family has created a business around the show.").

282. See GA. CODE ANN. § 39-2-18(a) (2009); see also 17 GA. JUR. *Employment* § 6:14 (West 2009). Neither "actor" nor "performer" is defined. See GA. COMP. R & REGS. § 300-7-1-.01 (2009). Rhode Island has a similar exemption, though the language of its provision is somewhat outdated. See R.I. GEN. LAWS § 28-3-9 (2009).

283. GA. CODE ANN. § 39-2-18(a) (2009).

minor, whether the minor's education will be neglected, and whether the minor will be used for pornographic purposes.²⁸⁴ One might argue to the Commissioner that the employment conditions surrounding reality programming are clearly detrimental to children,²⁸⁵ but it is not clear whether such an argument would prevail.²⁸⁶

In Montana, minors employed as actors or performers—irrespective of whether in reality programming—receive less protection than in other states. Like the FLSA, Montana law expressly exempts them from protection.²⁸⁷ Montana also exempts children employed by their parents.²⁸⁸ If executives pay parents rather than children, one might argue that the parents and not the executives are employing the children, and thus, this exemption also blocks labor-law protection.

284. GA. CODE ANN. § 39-2-18(b) (2009); *see also* GA. COMP. R & REGS. § 300-7-1-.03 (2009) (detailing notification requirements).

285. The Commissioner may rescind its consent. GA. COMP. R & REGS. § 300-7-1-.09 (2009).

286. *Cf. supra* note 255 and accompanying text.

287. *See* MONT. CODE ANN. § 41-2-104(5) (2009). Of course, courts would need to determine whether a child participating in reality programming is an “actor” or “performer” within the meaning of the statute. If not, this provision should not apply.

Texas also has an exemption for child performers. *See* TEX. LAB. CODE ANN. § 51.012 (Vernon 2009) (“The commission by rule may authorize the employment of children under 14 years of age as performers in a motion picture or a theatrical, radio, or television production.”); *see also* *Waldie v. State*, 923 S.W.2d 152, 155 (Tex. Crim. App. 1996) (noting that Texas law prohibits employing anyone under age 14, unless an exemption applies, and citing exemptions). The Texas Workforce Commission has authorized employment of child actors under age 14 subject to some non-rigorous limitations. *See* 40 TEX. ADMIN. CODE §§ 817.31 (2009) (requiring compliance with administrative code subchapter to employ child actors under age 14), 817.33 (providing limitations). Only one of the limitations might prevent children from participating in reality programming. *See* 40 TEX. ADMIN. CODE § 817.33(2) (2009) (prohibiting child actors from working “in a position declared hazardous by the Commission”). Using this provision to prevent children from participating in reality programming requires arguing that it is “hazardous.” The Commission has not yet deemed such participation hazardous. *Cf. supra* note 255 and accompanying text.

Another statutory exemption may also permit children in reality programming to participate alongside their parents if participation is deemed “nonhazardous.” *See* TEX. LAB. CODE ANN. §§ 51.003(a)(1) (Vernon 2009) (providing exemption where child is employed under her parents supervision, in a business owned or operated by her parents, where the occupation is “nonhazardous”). Yet another exemption enables children to participate in “nonhazardous casual employment that will not endanger the safety, health, or well-being of the child and to which the parent or adult having custody of the child has consented.” TEX. LAB. CODE ANN. §§ 51.003 (a)(6) (Vernon 2009). Texas law has not established whether participation is “nonhazardous.” *See, e.g.*, TEX. LAB. CODE ANN. § 51.014 (Vernon 2009) (discussing “hazardous” occupations generally and specifying a hazardous occupation, but not mentioning reality programming); *Waldie*, 923 S.W.2d at 157 (explaining that “nonhazardous casual employment” should be given its plain meaning to the extent it is undefined by statute).

288. *See* MONT. CODE ANN. § 41-2-104(3) (2009).

Children in reality programming receive varying protection depending on the state law that applies.²⁸⁹ Programs filmed in one state will encounter less restriction than in others. Even in states with detailed laws for child performers, the extent to which these laws protect children in reality programming is far from clear. What is clear is that these laws fail to provide the scope of protection needed.²⁹⁰ Further, variability among state laws makes them susceptible to forum shopping.²⁹¹ For all these reasons, the current state-law regime is inadequate to stop the current exploitation of children by reality programming.

IV. THE CASE FOR A FEDERAL STATUTE

Multiple options are available to address inadequacies in the current legal landscape. After discussing each option, this Part maintains that the best solution is for Congress to enact a federal statute regulating employment of children in reality programming. This statute would provide a sliding scale of prohibition based primarily on age, ideally resulting in total prohibition for the majority of minors.²⁹² This option provides the most protection for children while avoiding the pitfalls inherent in the other options.

289. To provide a couple more examples, on its face, Kansas law seems to apply to children in reality programming. *See* KAN. STAT. ANN. § 38-618(b) (2009) (providing that section applies to contracts for sale of performance of, story of, or incidents in one's life). If it does apply, Kansas law offers these children some protection, though it is mostly economic. *See* KAN. STAT. ANN. § 38-617 (2009) (stating that earnings accumulated under contracts set forth in 38-618 are sole legal property of minor); *id.* 38-619 (providing for court approval of such contracts); *id.* 38-20(b)(1) (mandating creation of trust for a percentage of a minor's earnings).

Alaska law expressly exempts minors employed in the entertainment industry from labor-law protection. *See* ALASKA STAT. § 23.10.330(b) (2009). But, its administrative regulations offer some protection. *See* ALASKA ADMIN. CODE tit. 8, §§ 05.300 (2009) (requiring a permit for minor to work in the entertainment industry); *id.* 05.310 ("No child may perform in the entertainment industry except as provided in law and the permit," and no permit shall issue "for the exhibition, rehearsal, or performance of a child that is harmful to the health, development, education, or welfare of the child"); *id.* 05.315 (requiring as a prerequisite for issuing a permit that the minor receives a studio teacher in certain circumstances); *id.* 05.340(a)(1) (prohibiting minors from working in the entertainment industry in "a practice, exhibition, or situation that places the child in clear and present danger to the health, development, or welfare of the child"). It is certainly arguable that participating in reality programming is "harmful to the health, development, education, or welfare" of children. Indeed, this article maintains as much. It is not clear that participation creates a "clear and present danger," but one might argue it does, particularly where it places children in harmful situations. *But cf. supra* note 255 and accompanying text.

290. *See infra* Parts II, IV.

291. *See infra* Part IV.

292. The sliding scale is discussed more below.

A. *Amending State Laws*

The first option is for states to amend their laws to ensure that they clearly protect children in reality programming. If every state complied, this would be a decent option. Such spontaneous, universal compliance, however, is unlikely. Further, even if states were to enact statutes, they will inevitably vary, especially as courts interpret them. Courts in one jurisdiction are not bound to interpret their laws consistently with other jurisdictions' laws.²⁹³ Thus, even if all states enact equally stringent statutes, their laws will likely differ as a result of judicial interpretation. Variability creates a problem because of the nature of reality programming.

Unlike traditional programming, which is often localized in certain states, reality programming does not require elaborate production studios or sets and can occur everywhere.²⁹⁴ Since programming is not tied to entertainment hubs, program executives can forum shop, avoiding states with protective laws and filming in states with less stringent laws.²⁹⁵ Flexibility over filming locations combined with variability in state law enables executives to ensure the least amount of government interference. If New York and California present too many obstacles to creating a successful series using children, the show will simply move to a different state.

This is not a baseless prediction. It has already happened. *Kid Nation* executives deliberately located their show in New Mexico, a state then known for having some of the most lenient child-entertainer laws, because it enabled them to produce their controversial reality series.²⁹⁶ “In California or New York they would never have gotten away with this.”²⁹⁷

293. States may, of course, choose to interpret them similarly, particularly if the statutes are identical.

294. For example, the Gosselins live in Pennsylvania while the family starring in “Table of 12” lives in New Jersey. See Sultan, *supra* note 13; *Jon, Kate: Hometown Antiheroes*, NEWS-PRESS, June 5, 2009, at 41G; Richard Huff, *It's Just too Late for Jon & Kate: TLC Oughta Pull Plug on this Family Trauma*, N.Y. DAILY NEWS, June 4, 2009, at 77.

295. Staenberg & Stuart, *supra* note 42, at 30.

296. See Sheridan, *supra* note 84, at 32; de Moraes, *supra* note 117, at C07. Shortly after the filming of *Kid Nation*, the New Mexico legislature tightened the law. *Id.* Other states could, of course, follow suit, but waiting for each state with lenient laws to change them seems a slow solution to the problem, and it does not eliminate the issue of variability that may occur when courts in different states interpret different laws. *Cf. supra* note 255 and accompanying text.

297. Sheridan, *supra* note 84, at 32 (quoting Kim Talman of the National Association to Protect Children). The show's creator even admitted that he avoided including children from New York or California in the show because of potential labor issues. Fernandez, *supra* note 87, at A1.

Producers may avoid strict labor laws by filming in states less frequently touched by the entertainment industry, and thus, potentially less likely to have legislatures that enacted comprehensive protection for these children.²⁹⁸ Incidentally, these states are also the most appealing for reality programming because “reality’s” appeal is that it features everyday folks with whom viewers can relate. Producers may not even want individuals from New York or California because of a perceived link to the entertainment industry, which makes them seem more like professional actors, and thus, less “real.”²⁹⁹

As long as some states provide a safe harbor for these shows, the nation’s children will not be safe. Because of the nature of the reality programming format and state law, state law is inadequate. The serious problem of exploitation of children by reality programming should not be left to the vagaries and ambiguities of state law.

B. Federal Options

There are multiple possibilities for addressing the problem of children in reality programming through federal law. The option likely to yield the best result is for Congress to enact a federal statute expressly regulating employment of children in reality programming. One possible statute might provide a sliding scale of prohibition based primarily on age. A federal statute would remedy the problem most effectively.

1. An Express Statute: The Ideal

Congress should provide that, notwithstanding the FLSA or other law, children under a specified age may not appear in reality programming. The statute could define “reality programming” as it is defined in this article, as a format of entertainment in which individuals are employed to be filmed for profit (whether funds are paid to them, their parents, or others on their behalf) as they engage in purportedly unscripted activities.³⁰⁰ It would not include isolated instances where children appear for less than one hour of total appearance time on

298. Exceptions exist. For example, Kansas is not necessarily an entertainment hub, but its laws protecting child performers offer fairly comprehensive protection. *See supra* note 270 and accompanying text.

299. *See, e.g.,* Fernandez, *supra* note 87, at A1 (quoting *Kid Nation* creator who said that he was comfortable avoiding kids from New York and California because those would likely be kids in the entertainment business and not all-American kids with whom viewers could relate).

300. *See supra* note 32.

camera in a program. This caveat ensures that children who are merely ancillary figures needed to tell stories are not prohibited from participating in a limited fashion. Such limited participation should not bring the harmful consequences detailed above that repeat exposure, which destroys privacy, causes. Reality programming would encompass whatever media is used to disseminate such programming, such as television (cable and broadcast), movies, DVDs, and the Internet.³⁰¹

Congress could investigate and hold hearings to determine the appropriate age for prohibition. It might consult with child psychologists and others to determine at what point in development appearing in reality programming becomes least harmful. With this in mind, Congress should develop a sliding scale of prohibition and regulation. For example, from infancy to age 15, no participation; ages 16 and 17, participation is permissible subject to regulation regarding conditions of employment; age 18 and over, no regulation. This option is ideal because it enables Congress to enact a clear statute with an express pronouncement regarding employing children in reality programming.³⁰²

2. Second-Best Possibilities

Congress need not enact a free-standing statute expressly regulating children in reality programming. There are other options, but each presents its own set of problems.

First, Congress could eliminate the FLSA exemption for child performers entirely, which would subject all child performers to FLSA protection. This option is overly broad and under-inclusive. It is overly broad because it will result in all child performers receiving FLSA coverage, yet all child performers are not necessarily subject to the same harms as children in reality programming. Non-reality child performers do not completely lose their privacy by cameras capturing their every life experience, even in their own homes. Such performers at least have

301. *See id.* In crafting this definition, the author attempts to ensure that it is sufficiently narrow so as not to prohibit expressive activities beyond “reality programming” of the type deemed harmful here and that it retains sufficient connection to employment, which is the Commerce Clause basis for the federal statute. *See infra* Part V.

302. If a sliding scale favoring prohibition is too extreme, Congress could set a different scale perhaps favoring participation but prohibiting it for very young children (e.g., from infancy to age 5), or it may regulate heavily the scope of participation for children who participate. At a minimum, children should not spend the better part of their young lives living before cameras for others’ amusement nor should they be cajoled into participating in social experiments that are harmful or unsafe.

some shield between their private lives and public exposure.³⁰³ Additionally, because the exemption for child performers has endured for many years,³⁰⁴ this option may not gain favor.³⁰⁵ It is also under-inclusive because removing the exemption does not clearly ensure that children in reality programming will receive adequate protection. There is no provision in the FLSA that expressly bans children from participating in reality programming. The FLSA does prevent “oppressive child labor,” but it is not clear that reality programming necessarily qualifies as such, though it may.³⁰⁶ To avoid an interpretational quagmire that requires further clarification, the more direct option offered above is preferred.

Second, the Secretary of Labor could amend the definition of “performer” so that it expressly excludes participation in reality programming.³⁰⁷ This would result in a similar outcome as the last option because it would cause the FLSA to apply to these children by expressly eliminating the exemption for them. It is narrower than that choice because it would not eliminate the exemption for all child performers but would instead only exempt children in reality

303. Admittedly, some child-actor mega-stars cannot escape the hounding of paparazzi invading their private spheres. But at least they still have the inside of their own homes as a safe haven.

304. See *supra* Part III.C.

305. It is, in part, for this reason that this article addresses only children in reality programming rather than the broader issue of child performers generally. In limiting the article’s scope, the hope is this narrower issue, which brings particularly grave consequences, might actually be remedied.

306. See 29 U.S.C. § 212(c) (2006) (“No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.”); *id.* § 203(l)(1) (defining “oppressive child labor” to include, *inter alia*, employment of anyone under age sixteen unless the employer is a parent employing her child in an occupation other than manufacturing, mining, or an occupation the Secretary of Labor has deemed hazardous or detrimental to the health and well-being of children ages sixteen to eighteen); see also §§ 29 C.F.R. 570.117 (2009) (elaborating on “oppressive child labor”), *id.* § 570.58-68 (setting forth hazardous activities for children ages 16 to 18, and none resembles participation in reality programming), *id.* § 570.120 (same). But see 29 U.S.C. § 203(l)(2) (2006) (granting Secretary of Labor power to permit employment of children ages fourteen to sixteen in certain occupations); 29 C.F.R. § 570.34 (2009) (detailing permitted occupations for minors between ages 14 and 16 employed in retail, food service, or at gas stations). Because parents arguably employ their children when they contract with program executives for a show featuring their family, participation in reality programming may not constitute “oppressive child labor.” This, of course, may also depend on the structure of the contract.

307. See 29 C.F.R. § 570.125 (2009). The Secretary chose to follow the definition of “performer” provided in another regulation. See *id.* It could choose to amend the definition as it applies to the regulation at issue here.

Yet another option is to challenge the Secretary of Labor’s definition of “performer” in the courts. This is unlikely to succeed, however, because of the deference the courts accord administrative agencies. See *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

programming from the performer exemption—an exemption to the exemption.³⁰⁸ But this solution suffers from a similar infirmity as the last option because even without an exemption, it is not entirely clear that the FLSA will prevent children from participating in reality programming completely.

The third option is one that another commentator has argued for in a slightly different context: the adoption of a concrete federal right of publicity for children, which would enable them to capitalize on the sale of their privacy.³⁰⁹ This is inadequate here, however, because solidifying such a right would not prevent children from participating in reality programming. It would only provide them with a right that may yield a concomitant financial remedy. Monetary gain is inadequate, however, to protect children from the long-term psychological consequences from participating in reality programming.³¹⁰

None of these options remedies the problem as effectively as the federal statute proposed here. A federal statute setting a sliding scale of prohibition is not too broad, too narrow, nor too divisive. It is just right.

V. A FEDERAL STATUTE WILL NOT VIOLATE THE CONSTITUTION³¹¹

A. *The Commerce Clause Grants Congress Power to Enact This Law*

Congress has the power to enact this statute. It enacted the FLSA pursuant to its Commerce Clause authority.³¹² It may enact a related law to regulate employment of children in reality programming.³¹³

308. Solutions requiring exemptions to exemptions seldom bring clarity.

309. See generally Sara Kimball, Comment, *A Family Affair: Extending the Right of Publicity to Protect Celebrity Children*, 18 SETON HALL J. SPORTS & ENT. L. 181 (2008) (arguing for a federal right of publicity that would extend to children of celebrities, which would ensure that they receive a percentage of the money their celebrity parents earn from photographs of them, and also arguing that states should follow suit to solidify similar state rights).

310. See *supra* Part II. It is also undesirable as a matter of public policy to fashion a solution that encourages children to sue their parents. Yet parents are whom children would likely sue, assuming no parental immunity, see RESTATEMENT (SECOND) OF TORTS § 895G cmt. (1979) (predicting trend is complete abrogation of parental immunity), for violation of the children's publicity rights. Children are less likely to sue networks because networks may receive immunity for entering into contracts with parents who agree to allow their children to participate. Cf. *Shields v. Gross*, 448 N.E.2d 108, 112 (N.Y. 1983) (noting that a defendant to a claim of invasion of privacy has immunity to the extent of parental consent). It is better to regulate conduct on the front end and prevent employment of children in reality programming, as proposed here, rather than force children to litigate against their parents after their parents have allegedly violated their rights.

311. This Part is not intended to treat exhaustively the major constitutional-law doctrines discussed herein. Rather, it attempts to address the primary objections to the article's thesis and show why these objections should not prevail.

The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce among the several states.³¹⁴ Congress has the authority to regulate in three general areas.³¹⁵ First, “the Commerce Clause gives Congress authority to ‘regulate the use of the channels of interstate commerce.’”³¹⁶ Second, it empowers Congress “‘to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.’”³¹⁷ Third, it grants Congress the power to regulate activities that “‘substantially affect interstate commerce.’”³¹⁸ Because a statute prohibiting employment in reality programming targets participation wherever it occurs, the third test is most appropriate.³¹⁹

Pursuant to its Commerce Clause power, Congress can prescribe rules to govern commerce.³²⁰ This power extends not only to

312. See *supra* note 179 and accompanying text.

313. “It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.” *United States v. Darby*, 312 U.S. 100, 114 (1941).

This federal statute would trump inconsistent state law. “Though states are independent sovereigns, the United States Constitution provides that federal law is supreme and contrary state law must yield.” Dayna B. Royal, *Take Your Gun to Work & Leave it in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 FLA. L. REV. 475, 480 (2009) (citing U.S. CONST. art. VI, cl. 2; RONALD ROTUNDA & JOHN NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 12.1 (Thompson West 4th ed. 2007) (1986)).

314. U.S. CONST. art. 1, § 8, cl. 3.

315. *Gonzales v. Raich*, 545 U.S. 1, 16 (2005).

316. *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003) (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)); see also *Gonzales*, 545 U.S. at 16.

317. *Pierce County*, 537 U.S. at 147 (quoting *Lopez*, 514 U.S. at 558); *United States v. Morrison*, 529 U.S. 598, 607 (2000) (quoting same); see also *Gonzales*, 545 U.S. at 16-17. Employment in reality programming seems an ill fit with this category. Cf. *United States v. McFarland*, 311 F.3d 376, 391 (5th Cir. 2002) (per curiam) (Garwood et al., dissenting) (“That category applies to instrumentalities of interstate commerce, such as an aircraft or a railroad line, and to persons or things in interstate commerce, such as thefts from interstate shipments.” (internal quotations omitted)).

318. *Gonzales*, 545 U.S. at 17. “In assessing the scope of Congress’ authority under the Commerce Clause authority . . . [the Court] need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.” *Id.* at 22; see also *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1003 n.3 (7th Cir. 2003) (noting well-settled doctrine that “so long as the regulatory statute bears a substantial relation to commerce, a single entity may be constrained by it, despite the entity’s arguably minimal impact on interstate commerce.”)

319. Cf. *Morrison*, 529 U.S. at 609 (noting third test is appropriate when statute is focused on “violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)”). *But cf.* *Associated Press v. N.L.R.B.*, 301 U.S. 103, 128 (1937) (suggesting the second test might also apply here because networks are likely instrumentalities of interstate commerce).

320. *United States v. Darby*, 312 U.S. 100, 113 (1941).

“regulations which aid, foster and protect the commerce,” but it also “embraces those [regulations] which prohibit [commerce].”³²¹ The proposed statute would do both. It would prohibit employment of children under a certain age. For children beyond that age, it would regulate employment.

In determining whether Congress has exceeded its authority under the Commerce Clause, the Supreme Court defers to Congress, presuming a congressional enactment is constitutional and invalidating it only upon a plain showing that Congress has exceeded its authority.³²² The modern interpretation of Congress’ power under the Commerce Clause is “expansive.”³²³ “In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is commerce which concerns more States than one and has a real and substantial relation to the national interest.”³²⁴

According to the Supreme Court, the Commerce Clause grants Congress the power to enact statutes that regulate economic matters.³²⁵ “‘Economics’ refers to ‘the production, distribution, and consumption of commodities.’”³²⁶ Congress has the power to regulate the commercial sphere because of an assumption that there is a single, national market and a unified purpose to build a stable national economy.³²⁷ Where Congress has attempted to regulate non-economic criminal activity—on the other hand—the Court has found that Congress exceeded its Commerce Clause power.³²⁸ “[T]hus far in our Nation’s history our

321. *Id.*

322. *See Morrison*, 529 U.S. at 607 (2000); *United States v. Miss. Dep’t of Pub. Safety*, 321 F.3d 495, 500 (5th Cir. 2003) (noting time-honored presumption that dually enacted statute is proper exercise of Congress’ legislative power).

323. *See Morrison*, 529 U.S. at 608. *But see id.* (noting that this expansive power is “not without effective bounds”). Few laws are struck on Commerce Clause grounds. *See* Brannon P. Denning & Glen H. Reynolds, *Rulings & Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1262-66 (2003).

324. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964) (internal quotations omitted).

325. *See Morrison*, 529 U.S. at 610 (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” (internal quotations omitted)); *see also Gonzales v. Raich*, 545 U.S. 1, at 25 (2005); *Heaberlin Farms Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 822 (Iowa 2002).

326. *Gonzales*, 545 U.S. at 25 (quoting dictionary).

327. *See Morrison*, 529 U.S. at 611.

328. *See id.* at 610. That the activity was non-economic criminal activity in *United States v. Lopez* was “central” to the Court invalidating the statute there. *See id.* at 610. This is because “[t]he Constitution requires a distinction between what is truly national and what is truly local.” *Id.* at 617.

cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”³²⁹

Congress’ Commerce Clause power also enables Congress to regulate employment.³³⁰ “This power extends to ostensibly intrastate economic activity that has a cumulative substantial effect on interstate commerce.”³³¹ The Second Circuit has thus held that “no extended discussion is required to show that employment agreements . . . evidence a transaction involving commerce.”³³² The Fifth Circuit has agreed that Congress has the power to regulate labor.³³³ As it explained, “the Supreme Court has recognized that effects on employment affect commerce.”³³⁴ According to the Fifth Circuit, there is a “national labor market,” thus labor and employment substantially affect interstate commerce.³³⁵ Indeed, numerous statutes involving labor and employment have survived Commerce Clause scrutiny.³³⁶

The labor statute proposed here should also survive, especially in light of the deference granted to Congress in this arena. Congress has the authority to regulate employment of children in reality programming. Such employment involves economic activities that affect the national labor market, and therefore, substantially affect interstate commerce.³³⁷

329. *Id.* at 613.

330. *See Adams v. Suozzi*, 433 F.3d 220, 225 (2d Cir. 2005).

331. *Id.*; *see also* *United States v. Miss. Dep’t of Pub. Safety*, 321 F.3d 495, 500-01 (5th Cir. 2003).

332. *Adams*, 433 F.3d at 225 (internal quotations and modification omitted).

333. *See Miss. Dep’t of Pub. Safety*, 321 F.3d at 500-01.

334. *Id.* at 500.

335. *See id.* at 500-01.

336. *See, e.g.*, *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192-94 (1946) (rejecting Commerce-Clause attack against FLSA); *United States v. Darby*, 312 U.S. 100, 114-17 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937) (upholding National Labor Relations Act against Commerce-Clause challenge); *United States v. Miss. Dep’t of Pub. Safety*, 321 F.3d 495, 500-01 (5th Cir. 2003) (finding that the enactment of Americans with Disabilities Act is proper exercise of Congress’ commerce power and supporting conclusion with Supreme Court precedent); *EEOC v. Ratliff*, 906 F.2d 1314, 1315-16 (9th Cir. 1990) (noting that Title VII is a proper exercise of Congress’ Commerce Clause power).

337. *Cf. Miss. Dep’t of Pub. Safety*, 321 F.3d at 500-01. That Congress would be legislating against a moral wrong does not undermine the validity of such legislation. *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 257. This article primarily highlights employment as the Commerce Clause link (rather than Congress’ authority to regulate the airwaves) because it proposes that Congress enact a labor statute. The proposed statute would apply irrespective of whether the reality programming reaches the public via the airwaves or in some other format, like DVD. In other words, the proposed statute is a general employment regulation and not a regulation targeting broadcast or cable specifically. Incidentally, the Supreme Court has recognized that Congress has Commerce Clause power to regulate the airwaves. *See, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984) (stating that Congress’ commerce power to regulate the broadcast medium is well established).

The link between such employment and interstate commerce does not require piling inferences upon inferences: it is quite clear.³³⁸

Producing and distributing reality programming are commercial activities undertaken to earn profit. The public consumes the finished reality programming product across the country and across individual state boundaries. National consumption of reality programming simultaneously provides advertisers with a forum to target their products to a national audience.

In a case instructive here, *Associated Press v. N.L.R.B.*, the Supreme Court explained that “[i]nterstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution.”³³⁹ In that case, the AP’s New York office received news from across the globe and disseminated it back from whence it came, though editing and other functions occurred only in New York.³⁴⁰ Because interstate communication is interstate commerce, the Court held, the AP is subject to the National Labor Relations Act.³⁴¹

The same logic applies here. Reality programming, though possibly filmed and edited intrastate, is transmitted interstate. Such programming comprises interstate communication of a business nature. Congress, therefore, has the power to regulate employment in it.³⁴²

Further, reality programming results in other goods directly traded in commerce. For example, the programming itself may reach its audience via goods, like DVDs,³⁴³ which customers purchase across the country. It may also provide the basis for secondary products, like books,³⁴⁴ which also move in interstate commerce.

Reality programming also affects interstate commerce by concentrating employment in specific states that enable the creation of such programming. If employment law for reality programming is not uniform, employment in this industry will skew across the country,

338. *Compare cf.* *United States v. Morrison*, 529 U.S. 598, 612-13 (2000).

339. *Associated Press v. NLRB*, 301 U.S. 103, 128 (1937).

340. *Id.* at 126-27. Additionally, the New York office operated a foreign service, which had staff and offices throughout the world. *Id.* at 126.

341. *See id.* at 126-29. That the AP did not sell news or earn a profit did not alter this conclusion. *See id.* at 129.

342. *Cf. id.* at 128-29.

343. *See, e.g.*, DVD: *Jon & Kate Plus Eight*, Seasons One & Two (Genius Products (TVN) 2007).

344. *See, e.g.*, JON GOSSELIN ET AL., *MULTIPLE BLESSINGS* (2008); *see also* TORI SPELLING, *MOMMYWOOD* (2009); JIM BOB DUGGAR & MICHELLE DUGGAR, *THE DUGGARS: 20 & COUNTING! RAISING ONE OF AMERICA’S LARGEST FAMILIES—HOW THEY DO IT* (2008).

favoring those states that permit employment practices beneficial to production and filming (but likely detrimental to children and society).

The Commerce Clause grants Congress the authority to enact the proposed statute, but Congress should tailor the statute to the parameters of its authority. To prevent an overly broad statute, Congress should include a jurisdictional provision providing that the statute is limited to employment in reality programming that affects interstate commerce.³⁴⁵

This provision indicates Congress' intent to exercise its commerce authority as broadly as constitutionally permissible.³⁴⁶ Congress has done this with another labor statute, Title VII.³⁴⁷ Title VII applies to employers in industries "affecting" interstate commerce.³⁴⁸ By applying the statute to activities that "affect" interstate commerce, Congress signaled its intent to act with the broadest commerce power possible.³⁴⁹ Courts understand and respect this. As one court explained, "[t]he 'affects commerce' jurisdictional obstacle is very low indeed."³⁵⁰ Congress should include a similar jurisdictional provision in the proposed statute so that courts recognize Congress intends to act with the full constitutional power of the Commerce Clause.

The Commerce Clause provides constitutional authority for Congress to enact a law regulating employment of children in reality programming. Congress should draft a law that manifests Congress' intention to act within the broadest bounds constitutionally permissible.

B. A Federal Statute Will Not Violate Due Process

Under English common law and since the early history of the United States, parents (in particular, fathers) have generally had power over their children subject to narrow exceptions.³⁵¹ The government

345. *Cf.* *United States v. Morrison*, 529 U.S. 598, 611-12 (noting that Congress' failure to expressly limit statute in this fashion was consideration in finding the statute exceeded Congress' commerce power, and explaining that "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce"). To further support the statute's constitutionality, Congress should also include findings regarding how employment in reality television affects interstate commerce. *Cf. id.* at 612.

346. *Cf.* *EEOC v. Ratliff*, 906 F.2d 1314, 1316 (stating that Congress worded Title VII to accomplish a similar result).

347. *See id.*

348. 42 U.S.C. § 2000e (2006).

349. *See Ratliff*, 906 F.2d at 1316.

350. *Id.* If an employer even serves individuals from out of state, it may be satisfied. *See id.* (citing *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977) (holding law firm is an "employer" under Title VII because it did business with national and international clients)).

351. *See Duncan, supra* note 169, at 1255-56; Wendy Anton Fitzgerald, *Maturity, Difference, & Mystery: Children's Perspectives & the Law*, 36 ARIZ. L. REV. 11, 36 (1994).

may restrict this power, *inter alia*, where appropriate for the children's health and well-being. Because employment of children in reality programming harms children, the government may restrict such employment without violating Due Process.

In the 1920s, the Supreme Court tied the right to raise children to the Constitution, decreeing that it is a fundamental right embodied in the Due Process clause of the Fourteenth Amendment.³⁵² As with other fundamental rights, the Court protects this right with the most stringent Supreme Court standard³⁵³ by strictly scrutinizing government interference with this right.³⁵⁴ Laws survive strict scrutiny only where they are narrowly tailored to serve compelling government interests.³⁵⁵

The Supreme Court has reaffirmed the importance of the right to parent one's children.³⁵⁶ In *Prince v. Massachusetts*, the Court stated: "It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."³⁵⁷

352. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (noting that cases have established the fundamental right of parents to make decisions regarding the care and custody of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923) (noting that "liberty" within the meaning of the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and *bring up children* . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (emphasis added)); *Pierce v. Soc'y of the Sisters*, 45 S. Ct. 571, 573 (1925); see also James A. Cosby, *How Parents & Children "Disappear" in Our Courts – And Why it Need Not Ever Happen Again*, 53 CLEV. ST. L. REV. 285, 293, 295 (2005-2006) (explaining that parents' Due Process liberty interests "are generally defined as rights to the 'care, custody, and control' of one's children" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))). However, "[p]resently there is no clear idea as to what the precise scope of a parent's rights to the 'custody, control and care' of a child really are." Cosby, *supra* note 352, at 296.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, cl. 1. The Fifth Amendment contains a comparable provision applicable to the federal government, see U.S. CONST. amend. V, which would apply here because the proposed statute is federal, not state.

353. See *Troxel*, 530 U.S. at 66-80; *United States v. Virginia*, 518 U.S. 515, 533 n.6 (1996) (characterizing strict scrutiny as the most stringent classification); Cosby, *supra* note 352, at 295.

354. See *Troxel*, 530 U.S. at 66-80; Cosby, *supra* note 352, at 295. Not all issues relating to parenting necessarily implicate fundamental rights receiving strict scrutiny. See, e.g., *Michel H. v. Gerald D.*, 491 U.S. 110, 125-27 (1989) (plurality) (declining to find a fundamental parental right for a biological father to contest paternity of a man deemed presumptive father under California law); Cosby, *supra* note 350, at 296.

355. See *Parents Involved in Cmty. Schools v. Seattle School Dist.*, 551 U.S. 701, 720 (2007) (stating strict scrutiny test).

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

357. *Id.*; see also *Troxel*, 530 U.S. at 65-66 (stating same).

The state follows this doctrine of “parental autonomy” when it defers to parents, often pursuant to their liberty interest in raising their children.³⁵⁸

Parental rights are also protected because society assumes “as a general matter, parents best provide for their children.”³⁵⁹ Courts thus generally defer to parental wishes, assuming that they are in the best interests of the children, by erring on the side of protecting parental control over the home.³⁶⁰

Parental rights are not limitless, however.³⁶¹ The state has a “compelling” interest in protecting minors’ physical and psychological well-being.³⁶² The Supreme Court has thus “sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”³⁶³ Particularly where children’s critical interests are at stake, “the law broadly errs on the side of *allowing* state intrusions into the family in order to prevent obvious and unnecessary harms to a child.”³⁶⁴ When a child’s welfare is threatened, the state may even terminate

358. Cosby, *supra* note 352, at 287-88.

359. Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability & Still Protect the Individual Child’s Best Interests*, 35 WILLAMETTE L. REV. 467, 468 (1999).

360. See *Troxel*, 530 U.S. at 68-69 (“[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”); Cosby, *supra* note 352, at 291-93.

361. See *Prince*, 321 U.S. at 166; *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (“Of course, the family is not beyond regulation.”). The state may intervene when necessary, but it should do so keeping in mind the presumption that a fit parent acts in her child’s best interests. *Troxel*, 530 U.S. at 69-71 (finding a visitation order unconstitutional where judge completely disregarded parental visitation preferences).

Children also have constitutional rights, which may detract from parental rights. For example, the Supreme Court has held that states may not deny minors access to abortions, see *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (finding state may not impose blanket parental consent requirement for obtaining an abortion), or contraceptives, see *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 (1977) (“Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed.”). Children also possess First Amendment rights, even while at school. See *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969); see also Part V (C)(2). But see *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-73 (1988) (granting school authorities wide latitude to regulate school-sponsored student speech). The Supreme Court has made clear that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” See *In re Gault*, 387 U.S. 1, 13 (1967).

362. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990).

363. *New York v. Ferber*, 458 U.S. 747, 757 (1982). This is because “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.” *Id.* (internal quotations omitted).

364. See Cosby, *supra* note 352, at 292.

parental rights.³⁶⁵ A child may also seek to have her own parents' rights terminated and become emancipated.³⁶⁶

The best interests of the child are often the focus in such matters.³⁶⁷ “[A] variety of legal proceedings involving children require a judge to make a decision based upon the ‘best interests’ of the child,”³⁶⁸ including which parent should have custody upon divorce.³⁶⁹ Such cases treat the child’s best interests as paramount.³⁷⁰

Children’s best interests are also important in financial matters.³⁷¹ To protect these interests, a court may interfere with a parent’s right to act on behalf of her children.³⁷² For example, where a parent may benefit financially to the detriment of her children, a conflict of interest often prevents the parent from representing her children’s interests in court.³⁷³ In such instances, a judge may appoint a guardian ad litem to

365. See Duncan, *supra* note 169, at 1257-58. The Supreme Court requires that the state prove its allegations by clear and convincing evidence to terminate parental rights. See Santosky v. Kramer, 455 U.S. 745, 769 (1982).

366. See, e.g., CAL. FAM. CODE § 7120 (West 2009) (detailing contents of emancipation declarations); FLA. STAT. § 743.015 (providing that court may remove disability of nonage); see also Jessica G. Gray, Note, *De-Sensationalizing the Child “Divorce”: A Jurisdictional Analysis on a Child’s Role in Terminating Parental Rights*, 39 SUFFOLK U. L. REV. 489, 503 (2006).

367. Cosby, *supra* note 352, at 287.

368. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children & the Adversary System*, 52 U. MIAMI L. REV. 79, 81 (Oct. 1997).

369. Bartlett, *supra* note 359, at 470. “This test simply adopts the goal as the standard itself, leaving it to the judge to determine what custodial arrangement, on a case-by-case basis considering all of the relevant facts, produces the best result for the child.” *Id.*; see also Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615, 626-29 (2004) (discussing the application of the best interests standard in child custody cases).

370. See *id.*; see also Cosby, *supra* note 352, at 287; Dep’t of Soc. Servs. v. Phillips, 618 S.E.2d 922, 923-24 (S.C. Ct. App. 2005) (stating that a child’s best interests are paramount in parental-rights-termination proceedings). Though, “[c]ommentators and practitioners in the custody dispute arena have expressed the sentiment that child custody matters are really not about the best interests of the child, but instead are about the interests of the parents (i.e., a contest between the rights of the two parents).” Weinstein, *supra* note 368, at 88.

At times, the best interests of the child conflict with parental autonomy. See Cosby, *supra* note 352, at 288. The law has not yet fully developed a means for reconciliation. See *id.* In more complicated cases, “often there are no clear nor consistent tests for determining *when* exactly the law should rely on [the best interest of the children versus parental autonomy]; for adequately *balancing* the interests of parent and child; nor for recognizing the most obvious of exceptions to the above doctrines.” *Id.*

371. See, e.g., Geddes v. Cessna Aircraft Co., 881 F. Supp. 94, 100-01 (E.D.N.Y. 1995) (appointing guardian ad litem for children as a matter of proper procedure where parents’ interests conflict with their children’s).

372. See *id.*

373. See *id.*; Novack v. Chait, 575 A.2d 908, 912-13 (N.J. Sup. Ct. App. Div. 1990) (holding trial court should have appointed guardian ad litem to represent child instead of permitting child’s mother to represent her child because mother had conflict of interest); see also Horacek v. Exon, 357 F. Supp. 71, 74 (D. Neb. 1973); Stewart v. Superior Court, 787 P.2d 126, 127 (Ariz. Ct. App.

represent the children's financial interests against the parent.³⁷⁴ Because this invades the parental province, however, "it must be exercised only upon a showing sufficient to trigger the court's *parens patriae* concern—that is, a showing that a child's parents, by conflict of interest or for other reasons, may be unable or unwilling to perceive or advance the child's best interest."³⁷⁵

Parens patriae authority enables the state to curtail parental control in various arenas for a number of legitimate reasons. "Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."³⁷⁶

The Court explained this in *Prince* when it upheld Massachusetts's child labor law against attack by a child's guardian who claimed the law violated her freedom of religion and Due Process right to parent her child.³⁷⁷ Per the Court, "[t]he state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment."³⁷⁸ According to the Court:

A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places³⁷⁹

1989); 43 CJS *Infants* §§ 41, 322, 329 (2006). Because the parents, acting in good conscience, might have desired a remedy that would not necessarily have been in their children's best interest, the *Horacek* court appointed a guardian ad litem "to recognize potential and actual differences in positions asserted by the parents and positions that need to be asserted on behalf of the [children]." See *Horacek*, 357 F. Supp. at 74.

374. See, e.g., *Geddes*, 881 F. Supp. at 100-01.

375. See *Stewart*, 787 P.2d at 127; see also 43 CJS *Infants* § 319 (2009) ("A court has broad discretionary powers, as *parens patriae*, to insure that the interests of an infant are protected."). *Parens patriae* is Latin meaning "parent of his or her country," and it describes "the state in its capacity as provider of protection to those unable to care for themselves." BRYAN A. GARNER, BLACK'S LAW DICTIONARY (8th Ed. 2004) (1983).

376. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). But see *Wisconsin v. Yoder*, 406 U.S. 205, 219-34 (1972) (finding that "the First and Fourteenth Amendments prevent the State from compelling respondents [Amish parents] to cause their children to attend formal high school to age 16" given no evidence that employing children on family farms is deleterious or that parents are exploiting their children).

377. See *Prince*, 321 U.S. at 159-69.

378. *Id.* at 168.

379. *Id.*

Though parents “have a fundamental right to determine how to best provide for their children, the state must also ensure that parents meet their ‘high duty’ to ensure their children’s well being.”³⁸⁰ The government thus has expansive power to limit parental freedom³⁸¹ and control parental discretion.³⁸²

A statute regulating employment of children in reality programming is an appropriate government exercise of this authority. The *Jon & Kate* situation provides a perfect example of why such a statute is a necessary and proper exercise of government power to regulate, even though it may limit parental control.

The Gosselin children have lived their lives in a media fishbowl.³⁸³ They “will not only know of their dad’s alleged affair, but all the dirty details.”³⁸⁴ There is no way adequately to measure the full extent of the harm this has inflicted on these children.³⁸⁵ Yet, their parents ignored this harm, exploiting their children for their own self-interest.³⁸⁶

Despite filing for divorce, the Gosselins “indicated they would continue allowing cameras to film the family’s life, just not with Mom and Dad there together.”³⁸⁷ Indeed, they continued their show until “[d]ays after learning that TLC would continue with a new version of *Jon & Kate Plus 8* that didn’t include him as a major factor, [Jon] demanded through his lawyers that the show cease production immediately or face potential criminal charges.”³⁸⁸ It is not terribly surprising that the Gosselins ignored the pain they were inflicting on their kids by forcing them to experience the divorce publicly until it suited their needs to end the show.³⁸⁹ Perhaps the Gosselins realized that

380. *Cosby*, *supra* note 352, at 287 (quoting *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925)) (internal footnotes omitted).

381. *Prince*, 321 U.S. at 167.

382. *See Parham v. J.R.*, 442 U.S. 584, 603 (1979). But, “[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.” *Id.* at 603.

383. *See Salamone*, *supra* note 17, at 22.

384. *Id.*

385. *See id.*

386. *See* Dr. Laura Schlessinger, *Why I Don’t Like Reality TV Shows*, blog, June 4, 2009, <http://www.drlaurablog.com/category/reality-tv/> (last visited June 16, 2009).

387. *In Brief*, THE ATLANTA J.-CONST., June 24, 2009, at 1D.

388. *See* Michael Y. Park, *Jon Gosselin Tries to End Kate Plus 8*, PEOPLE, available at <http://www.people.com/people/article/0,,20309351,00.html> (last visited Feb. 14, 2010).

389. *See* Maureen Ryan, *Jon & Kate Plus Divorce Papers*, CHI. TRIB., June 23, 2009, at Zone C The Watcher 1 (“Monday night’s special one-hour episode of ‘Jon & Kate Plus 8’ would have been shocking if the couple had announced they were ending the top-rated TLC cable show to work on their marriage. But no, they announced in their usual monotone – each shot separately, seated alone – what we all expected: They have ‘decided to separate.’”).

divorce would bring drama, even higher ratings, and more money. Rather than end the show for the sake of their family, they capitalized on the ending of their family for the sake of the show.

Profit potential reigned supreme. The parents ignored the best interests of their young children, despite that their interests were sorely in need of attention.

When parents employ their children in reality programming, they sell a precious aspect of their children's humanity: their privacy. They should not have the power to strip their children of this important aspect of their lives.

It is not unlike parents who once sold their children to "circus freak show[s]," to star as the main event.³⁹⁰ One can almost hear the advertiser hocking tickets:

Come in, come in and see what happens to children when their parents use them for your entertainment. . . . It's exciting, it's damaging, but you won't be able to take your eyes off 'em. Watch 'em wiggle. Watch 'em cry. Watch 'em squirm. It's so much fun . . . bring popcorn and beer and come watch the show.³⁹¹

"Overexposure is the flip side of neglect."³⁹² Selling children and their privacy is child abuse.³⁹³ "Certainly, there can be no pretense at education or spiritual elevation. This is pure, unconscionable abuse of parental power and influence."³⁹⁴ Michael Brody, media chairman of the American Academy of Child and Adolescent Psychiatry, agrees that such overexposure constitutes abuse.³⁹⁵

The ending of *Jon & Kate* does not eliminate the need for the legislation proposed here. Numerous other reality programs feature children and may continue to do so. See *supra* Part I. As noted, the We Network currently features a series entitled *Raising Sextuplets*, which follows a couple as they raise their sixteen-month-old sextuplets. See WeTV, *Raising Sextuplets*, <http://www.wetv.com/raising-sextuplets/about.php> (last visited Feb. 15, 2010). Even Jon and Kate Gosselin may resume filming their show. See Nicole Lyn Pesce, *Jon & Kate Gosselin in Talks with TLC to Resume Filming Their Children Again*, DAILY NEWS, Feb. 10, 2010, available at http://www.nydailynews.com/gossip/2010/02/10/2010-02-10_jon_and_kate_gosselin_in_talks_with_tlc_to_resume_filming_their_children_again.html (last visited March 8, 2010).

390. Schlessinger, *supra* note 386.

391. *Id.*

392. Sultan, *supra* note 13.

393. Schlessinger, *supra* note 74; Starr & Li, *supra* note 15, at 7.

394. See Schlessinger, *supra* note 74.

395. See Starr & Li, *supra* note 15, at 7. One online commentator reported that "[she] stopped watching [*Jon & Kate*] a year ago" because "[she] started feeling like [she], as a viewer, was complicit in some weird sort of child abuse." Sultan, *supra* note 13 (internal quotations omitted). There were also reports that children were subjected to abuse while participating in *Kid Nation*. See Fernandez, *supra* note 87, at A1.

Though the Gosselins are of course only one example of parents blatantly disregarding their children's best interests in exchange for fame and fortune, they colorfully illustrate the choice many parents have made.³⁹⁶ That parents have much to gain while their children have much to lose renders parents inappropriate gatekeepers to their children's employment in reality programming. The conflict of interest could not be any clearer.

Though parents retain broad control over their children, self-interest prevents them from acting in their children's best interests.³⁹⁷ "Bottom line: The minor child's welfare is clearly not the top concern of their parents, who are exploiting the dependency, love and innocence of their own children for an opportunity to be 'celebrities.'"³⁹⁸ Parents do not have the authority to "pimp" their children, yet that is what is happening.³⁹⁹ These parents are stripping the privacy and dignity from their children while "push[ing] the envelope farther than any responsible, loving, protective parent should in an attempt to gain ratings and increase celebrity status. These children are left to deal with disturbing private matters in a public forum with the sole purpose being entertainment."⁴⁰⁰ It must stop.

Because parents are too self-interested to act responsibly, the government must intervene.⁴⁰¹ "'The entertainment business is vast and powerful,' said Paul Petersen, who played son Jeff on 'The Donna Reed Show' in the 1960s and who, as an adult, founded the child star advocacy group, A Minor Consideration. 'Somebody has to stand up to them and say, 'You can't do this to children anymore.'"⁴⁰² The

396. The many reality shows involving children support this observation. See *supra* Parts I, II.

397. See Schlessinger, *supra* note 74.

398. *Id.*

399. *Id.* Money earned for college does not legitimize children's participation in reality programming. See *id.* Inflicting psychological damage upon children does not become proper because it provides some long-term financial benefit. *Id.*; see also Part II.

400. *Id.*

401. One commentator, however, doubts that reality programming will capture politicians' attention. See Lowry, *supra* note 78, at Television 13 ("[D]on't count on politicians to help, inasmuch as debating reality TV ethics lacks the glowing headlines (Sex! Violence! Smoking!) that traditionally attract them, moth-like, toward pop culture.").

Like parents, reality programming executives are similarly too self-interested to consider what is at stake and to discontinue exploiting children's privacy. For instance, despite demand that "TLC executives should [have] step[ped] up and do[ne] the right thing – kill[ed] 'Jon & Kate Plus 8,'" because it [was] broken, see Huff, *supra* note 294, at 77, there was no sign that they would, see Allen-Mills, *supra* note 10, at News 26. As one TLC representative admitted, the show would go on "as long as interest continue[d] and the family want[ed] to do it." See *id.* (quoting TLC representative).

402. See Starr & Li, *supra* note 15, at 7.

numerous reality programs featuring children reveal that parents are unwilling to do this.⁴⁰³ The government therefore must.

The sliding scale of prohibition this article suggests as the framework for a federal statute is an effective means to protect children from reality programming, and it does not violate Due Process.⁴⁰⁴ It serves a compelling interest: regulation of employment to protect the psychological, emotional, and physical well-being of children. It is also narrowly tailored. If—as this article suggests—Congress consults with experts to determine the exact bounds of the statute’s scale, then Congress should ensure that the statute protects children at their various stages of development in a manner necessary in light of their age.

C. *A Federal Statute Will Not Violate the First Amendment*

Though the First Amendment⁴⁰⁵ is an important cornerstone of democracy, it may not displace laws like the one proposed here: generally applicable, neutral laws that simply regulate the manner of expression. The First Amendment does not automatically trump principled discussion about the propriety of such neutral regulation.⁴⁰⁶ As cultural historian Rochelle Gurstein has suggested, society must “discriminate between the essential circulation of ideas, which is the cornerstone of liberal democracy, and the commercial exploitation of news, entertainment, and sex as commodities.”⁴⁰⁷ The law proposed here regulates exploitation of children against the serious harm that participating in reality programming causes. This neutral regulation will not violate the First Amendment rights of those whom it regulates, reality programming proprietors and would-be child participants.⁴⁰⁸

403. See *supra* Parts I, II.

404. See *supra* Part IV (B)(1).

405. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

406. Cf. GURSTEIN, *supra* note 33, at 5-6 (explaining that the right to free expression should not trump a principled discussion about “our common world”).

407. *Id.* at 5. Discussion should also “distinguish between the expression of unorthodox ideas in the pursuit of truth, which is the lifeblood of art, and the desire to publicize anything that springs to mind in the name of artistic genius.” *Id.*

408. Nor would it violate parents’ rights to free expression. To the extent such regulation arguably infringes on expression, it affects children’s expression, not parents’, because it is the children’s expression that is limited. Parents are still free to participate in reality programming. Parents may not maintain that in violating their children’s right to free expression this vicariously violates the parents’ rights. See, e.g., *Hall v. Wooten*, 506 F.2d 564, 566 (6th Cir. 1974) (citing cases supporting the proposition that “one may not sue for the deprivation of another’s civil rights.”

1. The Proposed Statute Is a Generally Applicable Law Regulating Manner of Expression

Reality programming is not immune from regulation simply because it is a form of expression.⁴⁰⁹ It “has no special immunity from the application of general laws.”⁴¹⁰ Its proprietors must answer for libel, pay taxes, and suffer punishment for contempt of court like everyone else.⁴¹¹ Where a regulation is a neutral labor law that does not interfere with expression qua expression, it will be upheld.⁴¹² As the Court explained in *Oklahoma Press Publishing Co. v. Walling* when it upheld the FLSA against First Amendment attack, Congress may regulate against evils in the workplace where they adversely affect commerce— notwithstanding the First Amendment.⁴¹³

Leathers v. Medlock is also instructive here. In that case, the Court considered “whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media” and held it does not.⁴¹⁴ In that case, cable representatives challenged a law that taxed cable but exempted other media.⁴¹⁵ Cable petitioners argued that their activities were expressive and protected to the same extent as other media, yet they were treated differently, which violated the First Amendment.⁴¹⁶ The Court disagreed, explaining that differential treatment of speakers is “constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints”⁴¹⁷ or where it discriminates on speech content.⁴¹⁸

The primary inquiry to determine whether a regulation discriminates on content is whether the government adopted it to

including that a “father, not acting in his representative capacity, had no standing to sue for the deprivation of the civil rights of his child”).

409. *Cf. Associated Press v. NLRB*, 301 U.S. 103, 132, 123-24 (1937) (maintaining that agency of the press is not immune from general laws, including the National Labor Relations Act); *cf. also Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 581 (1983) (“It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.”); *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (compiling Supreme Court cases that have continued to support this holding as against First Amendment challenges to numerous laws).

410. *Cf. Associated Press*, 301 U.S. at 132-33.

411. *Cf. id.* at 133.

412. *See id.*; *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192-93 (1946).

413. *See Walling*, 327 U.S. at 193; *cf. also NLRB*, 301 U.S. at 130-31 (holding the NLRA does not violate First Amendment).

414. *Leathers v. Medlock*, 499 U.S. 439, 444, 453 (1991).

415. *Id.* at 442-43.

416. *Id.* at 442.

417. *Id.* at 447.

418. *Id.*

regulate the message expressed.⁴¹⁹ “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based.”⁴²⁰ On the other hand, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”⁴²¹

In *Leathers*, the Court found that the tax at issue was not content-based because it only distinguished between types of media; it did not suppress particular ideas.⁴²² The tax, a law of general applicability, did not target cable television “in a purposeful attempt to interfere with its First Amendment activities.”⁴²³ Nor did it penalize the few in an attempt to censor the ideas of a select group.⁴²⁴ The tax thus did not violate the First Amendment.⁴²⁵

A statute regulating the employment of children in reality programming would not target the few for censorship. It would apply to anyone and everyone attempting to employ children in reality programming, whether that programming is transmitted via cable, broadcast, movies, DVDs, or on the internet. It does not target the media; it targets employment of children.⁴²⁶

Further, it would not discriminate based on content or viewpoint. It would regulate employment of children in a specific format of communication (reality programming) that carries particular dangers specific to that format, which affect interstate commerce. Such regulation would apply irrespective of the content or viewpoint of the particular program. It would similarly regulate a program featuring toddlers in beauty pageants, toddlers in car accidents, and toddlers in preschool. It would also uniformly apply to programs expressing all

419. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 645 (1994).

420. *Id.* at 643.

421. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

422. *Leathers*, 499 U.S. at 450-53 (explaining that prior cases show that “differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas”).

423. *Id.* at 448. The Court so held despite characterizing cable television as part of the “press” and recognizing that the press receives heightened protection under the First Amendment because it is a government watchdog. *Id.* at 444, 447 (stating that “[a]bsent a compelling justification, the government may not exercise its taxing power to single out the press” because it plays a unique role as a government watchdog). The court characterized cable as part of the press because it includes news.

424. *Id.* at 448-49.

425. *Id.* at 447-48.

426. *Compare cf. Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 582-86 (1983) (discussing First Amendment problems with singling out only the press for differential tax treatment).

viewpoints—for example, both that toddlers should participate in beauty pageants and that they should not.

Such viewpoints are not silenced; they simply must occur through a different programming format—or, for that matter, through any other expressive means, such as a book or an editorial in the newspaper. The proposed statute would not apply to all programs concerning children in beauty pageants. Nor would it prevent shows that express the viewpoint that toddlers should or should not appear in beauty pageants. Rather, the statute would simply require using child actors to communicate such sentiments rather than “real” children whose lives are pawns for the communication of that expression.⁴²⁷ The statute thus regulates the manner of speech but not the speech itself. Neutral regulation of the time, place, and manner of speech is constitutionally permissible.⁴²⁸

A federal statute regulating employment of children in reality programming is content neutral. The Court subjects content-neutral regulation to “intermediate scrutiny,”⁴²⁹ upholding it where it furthers an important government purpose unrelated to suppression of free expression, and the incidental burden on First Amendment rights is no greater than necessary to further that interest.⁴³⁰ This standard “affords

427. That this may incidentally burden expression by preventing one entertainment format for communicating messages does not invalidate the regulation. *Cf. Rendon v. Transp. Sec. Admin.*, 424 F.3d 475, 479 (6th Cir. 2005) (“A content-neutral regulation that has an incidental effect on speech is upheld so long as it is narrowly tailored to advance a substantial government interest.”).

428. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976) (“Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment.”).

429. *Contra Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (noting that the Court’s “precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content” or that “compel speakers to utter or distribute speech bearing a particular message”); RONALD ROTUNDA & JOHN NOWAK, CONSTITUTIONAL LAW 1321 (7th ed. 2004) (1978) (explaining that content-based restrictions on protected speech must be narrowly tailored and necessary to serve a compelling government interest).

430. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*); *see also City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (plurality) (stating that where regulation is content-neutral, Court applies less restrictive test from *United States v. O’Brien*, 391 U.S. 367 (1968), which applies to symbolic speech).

Commercial speech also receives intermediate scrutiny. *See Cent. Hudson Gas & Electric Corp. v. Pub. Servs. Comm’n*, 447 U.S. 557, 573 (1980) (Blackmun, J. & Brennan, J., concurring). Though reality programming is a vehicle for earning profit, it is not “expression related *solely* to the economic interests of the speaker and its audience,” such as advertising. *See id.* at 561 (majority opinion) (emphasis added); *see also ROTUNDA & NOWAK, supra* note 313, at § 20.26. Thus, it is not commercial speech. *Cf. Cardtoons, L.C. v. Major League Players Baseball Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996) (finding trading cards are not commercial speech because they “do not merely advertise another unrelated product. Although the cards are sold in the marketplace, they are not transformed into commercial speech merely because they are sold for profit”); *cf. also Joseph*

the Government latitude in designing a regulatory solution.”⁴³¹ To satisfy it, “a regulation need not be the least speech-restrictive means of advancing the Government’s interests.”⁴³² A law is sufficiently narrowly tailored where it promotes an important government interest that would be accomplished less effectively without the regulation.⁴³³ Regulations are not invalid simply because an alternative that is less burdensome on speech exists.⁴³⁴ It suffices that Congress has determined that the means chosen add to the effectiveness of accomplishing its goal.⁴³⁵

The proposed statute serves an important government interest: Congress’ commerce authority to regulate employment.⁴³⁶ This interest is unrelated to any expressive message, which may still be communicated through other expressive outlets and entertainment formats.⁴³⁷ The statute prohibits one means of expressing the message

Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (finding motion pictures receive full First Amendment protection despite that they earn profit). According to *Wilson*, “[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.” *Id.* at 501.

431. *Turner II*, 520 U.S. at 213.

432. *Turner*, 512 U.S. at 665.

433. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006); *Turner II*, 520 U.S. at 213-14; *Turner*, 512 U.S. at 642.

434. See *Rumsfeld*, 547 U.S. at 67; *Turner II*, 520 U.S. at 217-18.

435. See *Rumsfeld*, 547 U.S. at 67; see also *Turner II*, 520 U.S. at 218 (“It is well established a regulation’s validity ‘does not turn on a judge’s agreement with the responsible decisionmaker [i.e., Congress] concerning the most appropriate method for promoting significant government interests.’” (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))).

436. Cf. *Bill Johnson’s Rest., Inc. v. NLRB*, 461 U.S. 731, 747 n.14 (1983) (noting the federal government’s “strong interest in enforcing federal labor laws”); *Millan Express Co., Inc. v. Western Sur. Co.*, 886 F.2d 783, 787 (6th Cir. 1989) (noting “historical federal interest in the regulation of interstate commerce”); *Miller v. United Food & Commercial Workers Union*, 708 F.2d 467, 471 (9th Cir. 1983) (noting Congress’ strong interest in regulating economic employment relationship); *Clark v. Esser*, 907 F. Supp. 1069, 1086 n.14 (E.D. Mich. 1995) (noting the federal government’s strong interest in enforcing federal labor laws); cf. also *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (noting that “Congress clearly asserted a strong governmental interest in eliminating religious discrimination in employment” when it enacted Title VII); *EEOC v. Tree of Life Christian Schools*, 751 F. Supp. 700, 711 (S.D. Ohio 1990) (noting that the Equal Pay Act is designed to address compelling government interest, ending workplace discrimination).

437. Cf. *Rumsfeld*, 547 U.S. at 60 (finding the Solomon Amendment, which denies funding to law schools refusing to give military recruiters same access as non-military recruiters, does not prevent law schools from expressing opinions against military’s employment policies; rather, it regulates law schools’ conduct, not speech (what they must do, not what they must say)); cf. also *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 292 (2000) (plurality) (“In light of the Pennsylvania court’s determination that one purpose of the ordinance is to combat harmful secondary effects, the ban on public nudity here is no different from the ban on burning draft registration cards in *O’Brien*, where the Government sought to prevent the means of the expression and not the expression of antiwar sentiment itself.”). In *Rumsfeld*, the Court provided a useful example. See *Rumsfeld*, 547 U.S. at 62. Congress may prohibit discrimination in employment, and the fact that this may compel

but not the message itself.⁴³⁸ Though the regulation may arguably burden some expression by eliminating one format for its expression, it is incidental to the primary goal of the statute. That goal is to eliminate the harmful secondary effects that accompany employment of children in reality programming.⁴³⁹

Congress should narrowly tailor such a statute to ensure that the sliding scale of prohibition prohibits no more speech than necessary to protect children at their various stages of development. Congress should include detailed findings supporting the scale it chooses. If Congress, after performing due diligence, determines that prohibiting employment of children up to a specific age, such as fifteen, is necessary to further its substantial interest, then this scale should be sufficiently narrowly tailored.⁴⁴⁰ This judgment is appropriately left to Congress.⁴⁴¹

Regulating employment of children in a business deemed harmful to them and that affects interstate commerce is the overriding objective for the proposed legislation. Where Congress' primary objective is supported with findings showing that the need for legislation is independent of the message conveyed, the Court will uphold such legislation.⁴⁴² Because this is the case here, the proposed statute should survive First Amendment scrutiny.

2. The Proposed Statute Does Not Violate Children's Speech Rights

The proposed law should also withstand First Amendment attack from would-be child participants. First, the law does not regulate the

employers to remove signs stating "White Applicants Only" does not transform the regulation from one of conduct to speech. *Id.* at 62.

438. *Cf. City of Erie*, 529 U.S. at 293. Even assuming, *arguendo*, that one message programming executives want to express is that children should be used in reality television, they may express this message in any other expressive format they wish. They may write editorial articles for newspapers, appear on television, and author books, to name a few. What they may not do is express this message by employing children in reality programming. *Cf. id.* at 293-94.

439. *Cf. id.* at 294-96 (applying secondary effects analysis to determine whether speech is content neutral).

440. *Cf. Frisby v. Schultz*, 487 U.S. 474, 485-86 (1988) (explaining that a "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy," which includes a complete ban).

441. *Cf. Rumsfeld*, 547 U.S. at 67; *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 at 193-96 (1997) (*Turner II*) (discussing the importance of the deference owed to Congress).

442. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646-47 (1997). *But see* *Simon & Schuster v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (stating that the Court has long recognized that even where Congress acts with proper governmental concern, regulation may still unduly burden First Amendment rights).

content or viewpoints of their speech. Second, the government has more leeway to regulate the speech rights of children because they lack the maturity to exercise these rights to the same extent as adults.

The proposed law does not target the content or viewpoint of children's expression. They may express their viewpoints on whatever content they choose. A youngster who wishes to communicate her opinion regarding the benefit of participating in beauty pageants, for example, may do so. She may paint a picture, author a book,⁴⁴³ or act in a play (or television show, movie, etc.) conveying her sentiments. Only one medium for expression is unavailable, reality programming. She may not communicate her sentiments through her own unscripted behavior on film for profit as she grows and develops during her young life. Because the proposed statute would not regulate the content or viewpoints of children's expression, it is a neutral-manner regulation of children as well.

To the extent that such a regulation incidentally infringes expression, however, this is permissible. The Supreme Court has explained that "[t]he state's authority over children's activities is broader than over like actions of adults."⁴⁴⁴ Children are vulnerable and lack maturity to make informed critical decisions. This lack of maturity justifies not equating children's rights with those of adults.⁴⁴⁵ The state has a strong interest in the well-being of its youth, and this interest justifies reasonable regulation aimed at them.⁴⁴⁶

443. Depending on her age, she may only have capacity to assist in this.

444. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944); *see also Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979); *Ginsberg v. New York*, 390 U.S. 629, 634-38, 643 (1968) (finding that magazines were not obscene for adults, but this did not prevent them from being obscene for children); Charlene Simmons, *Protecting Children While Silencing Them: The Children's Online Privacy Protection Act & Children's Free Speech Rights*, 12 COMM. L. & POL'Y 119, 130 (2007). In *Ginsberg*, the Court explained:

Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Ginsberg, 390 U.S. at 636 (internal quotations and modification omitted).

445. *See Bellotti*, 443 U.S. at 634. For a thoughtful book maintaining that because of this vulnerability, the First Amendment should apply less stringently to children, see KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (2003).

446. *See Bellotti*, 443 U.S. at 640-41.

Children are not without rights, however.⁴⁴⁷ Even in schools, where the government has heightened power to regulate children, they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁴⁸ They are persons under the Constitution, and they have fundamental rights that the government must respect.⁴⁴⁹ The government may not “arbitrarily” deny children freedom of expression.⁴⁵⁰

In determining the scope of children’s rights, the Court considers the purpose behind the rights.⁴⁵¹ The First Amendment’s purpose is to guarantee the liberty of expression to preserve a “free trade in ideas.”⁴⁵² The First Amendment grants more than just freedom to say, write, or publish what one wants.⁴⁵³ It grants each person the liberty to decide to what she will expose herself.⁴⁵⁴ “The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.”⁴⁵⁵

The Court has held that the government may determine that children lack that capacity to choose, and thus, the Court may prevent them from choosing from the marketplace of ideas where important decisions with potentially serious consequences are concerned.⁴⁵⁶ “These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”⁴⁵⁷ Because of this, despite the importance the Court has always placed on the First Amendment, it has

447. See *id.* at 633 (stating that children are not beyond the protection of the Constitution, which is not for adults alone).

448. *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969).

449. *Id.* at 511.

450. See *Bellotti*, 443 U.S. at 637 n.15. The Court upheld the First Amendment rights of the students in *Tinker* “because it found no evidence in the record that their [expression] threatened any substantial interference with the proper objectives of the school district,” and “because it appeared that the challenged policy was intended primarily to stifle any debate whatsoever—even nondisruptive discussions—on important political and moral issues.” *Id.* (citing *Tinker*, 393 U.S. at 510).

451. See *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring).

452. *Id.* (internal quotations omitted).

453. *Id.*

454. *Id.*

455. *Id.*; see also *Bellotti*, 443 U.S. at 636 (noting that the First Amendment right involves the right to make choices).

456. See *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring); *Bellotti*, 443 U.S. at 635-36 & n.13 (1979). It is arguably on this premise that the government may deprive children of numerous other rights that would violate the Constitution if denied to adults. See *Ginsberg*, 390 U.S. at 650.

457. *Bellotti*, 443 U.S. at 635.

permitted the government to control the conduct of children more than adults, even where it invades protected freedoms.⁴⁵⁸ It has explained that “the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice.”⁴⁵⁹

The proposed statute is such a law. It aims to regulate minors’ behavior because of their limited capacity to decide to participate in the harmful enterprise of reality programming. That this may incidentally burden their expression by eliminating one means for the expression is outweighed by the potential harm children face from participating.⁴⁶⁰

As Kevin Saunders explains in his book, *Saving Our Children from the First Amendment*, “[t]he values behind the First Amendment that make the costs [of expression] worth bearing are not as strong when children are involved.”⁴⁶¹ One important value undergirding the First Amendment is the importance of a “marketplace of ideas.”⁴⁶² The idea behind this is that truth will ultimately emerge if all competing ideas have freedom for expression.⁴⁶³ Thus, the remedy for “bad speech” is more speech, not censorship.⁴⁶⁴ “For children, however, more speech may not be an adequate remedy for bad speech” because children do not possess the same ability to reason as adults.⁴⁶⁵ “Children are in the process of development. Influences that might be minor for adults can have a seriously negative impact on children.”⁴⁶⁶

The strong lure of fame and fortune is especially powerful for children, and this prevents them from having the capacity to make an informed choice about whether to participate in reality programming.⁴⁶⁷ “[I]t’s very seductive,” says Dr. William Coleman who specializes in child development and behavior at the University of North Carolina, “for most kids to be a star, maybe to be discovered [M]ost kids would have a hard time saying no to this kind of invitation.”⁴⁶⁸ Children are

458. *Id.* at 636.

459. *See id.* at 637 n.15.

460. *See supra* Part II.

461. SAUNDERS, *supra* note 445, at 3.

462. *Id.* at 4, 29-30.

463. *See id.* at 29-30.

464. *Id.* at 30.

465. *Id.* at 30-31.

466. *Id.* at 3.

467. *See* NPR Broadcast, *supra* note 84; Sheridan, *supra* note 84, at 32 (querying whether an 8-year-old child can really provide informed consent to participate in reality programming).

468. NPR Broadcast, *supra* note 84. “[C]hildren are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights.” *See* Duncan, *supra* note 169, at 1271 (internal quotations omitted).

“too young to see the long-term picture and to weigh the potential impact on their psyche, reputation, and opportunities.”⁴⁶⁹ As the Supreme Court has recognized, scientific and sociological studies confirm that youth (even as old as age 16) lack the maturity and sense of responsibility of adults.⁴⁷⁰ “These qualities often result in impetuous and ill-considered actions and decisions.”⁴⁷¹ Supporting this conclusion is research showing that “adolescents are overrepresented statistically in virtually every category of reckless behavior.”⁴⁷²

Children lack the maturity to weigh the risks associated with participating in reality programming and to decide to accept such risks. They cannot fully understand the potential adverse consequences brought by the creation of public personas, which are broadcast for all to see and are memorialized for all time.⁴⁷³ Such personas “will certainly come back to haunt them in the future as people will form opinions about them which are based on these contrived and ‘unreal’ extraordinary circumstances. Their futures likely will be negatively impacted by this exposure and humiliation.”⁴⁷⁴ And the creation of a child’s public persona often comes at the cost of her private personality.⁴⁷⁵ Yet children are incapable of meaningfully weighing these considerations before deciding to sell their privacy.

Because the proposed regulation would regulate the manner of expression without regard to content, and it serves an important government interest, it does not violate the First Amendment. To the extent that this regulation may incidentally burden children’s expression by removing one format for such expression from the universe of options, it is necessary, considering the secondary effects associated with such participation and the inability of children to give informed consent to accept such consequences.

VI. CONCLUSION

This article has argued that the use of children in reality programming constitutes employment that is harmful to those children and society, and that the current legal regime is insufficient to address this emerging problem. As executives continue to create more extreme

469. Schlessinger, *supra* note 74.

470. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

471. *Id.* (internal quotations omitted).

472. *Id.*

473. Lowry, *supra* note 78, at Television 13.

474. Schlessinger, *supra* note 74.

475. *See supra* Part II.

programs, and parents continue to trade their children's best interests for fame and fortune, Congress must act.

Congress should enact a statute setting forth a sliding scale of prohibition for children's employment in reality programming based primarily on age. An express federal directive would bring clarity to this unsettled area of the law while ensuring that parents and programming executives cannot skirt individual state laws and continue to exploit the nation's children. This federal statute would not violate the Constitution as it is within Congress' Commerce Clause authority to enact, and it does not infringe parents' Due Process rights or the First Amendment. Nor does it impermissibly impair the children's First Amendment rights.

All the nation's children deserve to live as children and not as spectacles for public amusement. A federal statute regulating reality programming would prevent the sale of children's privacy to the highest bidder. Such a statute would make clear that some values are not for sale.