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

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Available at: https://works.bepress.com/dayna_harmelin/2/
Abstract

As popularity for “reality” programming continues to increase as does the number of children living their young lives on camera, this article argues that the current legal regime is inadequate to protect these children whose parents have traded their children’s best interests for fame and fortune. It argues that Congress should enact a statute providing a sliding scale of prohibition from reality programming for children based on age. A federal statute 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.

To this end, Part II identifies the various harms reality programming causes, arguing that participating in reality programming is detrimental both to the individual children and to society. Part III surveys the current legal landscape addressing the federal law on point—the Fair Labor Standards Act—and then numerous state laws, focusing heavily on those states 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 do so. Part IV posits that a national solution is necessary, canvasses the options, and then argues that a federal statute providing a sliding scale of prohibition is the best solution. Finally, Part V maintains that such a statute will not violate the Constitution because it is within Congress’s Commerce Clause authority and does not violate either parents’ due process rights or the First Amendment.

All the nation’s children deserve to live as children and not as spectacles for public amusement. A federal statute regulating employment in reality programming would prevent the sale of children’s privacy to the highest bidder.
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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² See VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD 6, 70 (Basic Books, Inc. 1985) (quoting Dr. Felix Adler) (quotations omitted).

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I. INTRODUCTION

“MOM TO MONSTER” roared the June 2009 cover of the tabloid magazine, Us Weekly. Inside, the reader discovers in large type: “Rocked by scandal and infatuated with fame, Kate Gosselin has cut a swatch of terror.” 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.

Kate Gosselin, husband Jon, and their eight children star in the hit reality show, “Jon & Kate Plus Eight,” (“Jon & Kate”) which chronicles the tumultuous life of two parents raising eight children—now eight-year-old twins and five-year-old sextuplets. For four seasons—the fifth season began this past May—the Gosselins have captivated viewers across the country. The show features constant parental bickering, which is characterized as one of its “main draws,” along with frequent, dramatic meltdowns of the Gosselin children. “Jon & Kate” is the most

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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.
7 See Will Controversy Help, supra note 6, at 1.
8 See id.
popular program in the history of its network, The Learning Channel (“TLC”). Nearly ten million viewers tuned in for the fifth season premiere. That is more than double the number who watched the fourth-season finale several weeks prior.

The boost in ratings is undoubtedly due to the recent tabloid frenzy surrounding allegations that Jon and Kate are both having extramarital affairs. While their marriage disintegrates before a television audience—they recently announced their divorce to nearly ten million viewers—the couple continues filming, earning a reported $75,000.00 per episode, $3,000 per hour for speaking engagements, and royalties from two books, with a third on the way. As the parents rake in money and other perks (ranging from gratis shopping sprees, to free cosmetic surgery, and vacations) while their marriage publicly crumbles, many have begun questioning the extent to which all of this has detrimentally affected their eight children, who have lived the majority of their young lives on camera.
The Gosselin children are not alone. The recent popularity of reality television has ushered forth a flood of children living on camera. TLC airs at least five other reality shows featuring children, including “18 Kids and Counting,” “Table for 12,” and “Toddlers & Tiaras.” The We Network also boasts a reality show featuring youngsters competing for beauty pageant crowns. 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.” 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. BRAVO’s latest reality program, “NYC Prep,” films a group of high school students in “Manhattan’s elite high school scene.”

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. According to MTV, “[t]he Osbournes are television's most infamous family, plus they're real and almost too raw for broadcast.” 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 Hollywood careers, querying whether they are “up for the challenge.”

The contract, leave the money behind and pull the pieces you have left of your life back together for the sake of these children”).

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

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, 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.”


See We, Little Miss Perfect, at http://www.wetv.com/little-miss-perfect/index.html (last visited on May 28, 2009).


BRAVO’s “Real Housewives” series also includes minors. See BRAVO, The Real Housewives of New Jersey, at http://www.bravotv.com/the-real-housewives-of-new-jersey (last visited May 27, 2009); BRAVO, The Real Housewives of New York City, at 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).


Id.

families of professional wrestlers star in such shows.\textsuperscript{26} 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.\textsuperscript{27} And now notorious, unemployed “Octomom,” Nadya Suleman,\textsuperscript{28} has landed a deal for a reality show to showcase her 14 children.\textsuperscript{29} “The show will be modelled [sic] after a successful Danish series that documents the lives of four children from birth until they become adults.”\textsuperscript{30}

One is forced to wonder whether any laws exist to protect these minors whose personal lives are laid bare as they are thrust into the paparazzi’s spotlight by their own parents. This article addresses this question, considering the best legal regime for regulating employment of children in reality programming\textsuperscript{31} 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 states laws, focusing heavily on those states with historic ties to the entertainment industry. Part III concludes that the current legal regime is inept atremedying 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, and it canvasses the options, arguing that an express federal statute providing a sliding scale of prohibition for children in reality programming is the best means of addressing this problem. Finally, Part V maintains that such a statute will not violate the Constitution because it is within Congress’s Commerce-Clause authority and does not violate either parents’ due process rights or the First Amendment.

\section*{II. REALITY PROGRAMMING HARMs CHILDREN \& SOCIETY}

Exploitation of children for amusement and financial gain is detrimental to children and society at large. It transforms children into commodities whose value is determined by their

\begin{itemize}
\item \textsuperscript{26} See IMDb, \textit{Hogan Knows Best}, available at http://www.imdb.com/title/tt0468996/ (last visited Aug. 12, 2009).
\item \textsuperscript{27} See Dan Lamothe, \textit{A Warrior’s Story: After the Crash That Nearly Killed Him, Questions Remain About Lance Cpl.’s Life}, \textit{NAVY TIMES}, July 28, 2008, at Newslines 34.
\item \textsuperscript{28} Aisha Sultan, \textit{Dirty Laundry: How to Prevent Another Octomom}, \textit{ST. LOUIS POST-DISPATCH}, March 9, 2009), at Lifestyle. Suleman attracted media attention when she delivered octuplets in early 2009. \textit{Id}. Harsh criticism followed when the public learned that Suleman already had six children at home whom she was unable to support. \textit{Id}.
\item \textsuperscript{29} See \textit{Eight's Enough in New TV Series}, N. TERRITORY NEWS (Australia), June 2, 2009, at 15; \textit{see also} Us \textit{WEEKLY}, supra note 3, at 60 (quoting Suleman’s lawyer); Starr & Li, supra note 15, at 7.
\item \textsuperscript{30} \textit{Eight's Enough in New TV Series}, supra note 29, at 15.
\item \textsuperscript{31} The phrase “reality programming,” as it is used in this article describes a format of entertainment in which individuals are paid or 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. It 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 TV, but these sources analogously and equally apply to all media that transmit the reality programming.
\end{itemize}
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.” 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. The use of children in this way is not only harmful to these children: it 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.

A. Reality Programming Harms Children

When children become money-making machines—as child entertainers often are—they become commodities creating a “commercialization effect,” which inevitably devalues children in society. 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.” Connecting children to a dollar value distorts and confounds their natural, human value thereby creating a greedy “cash nexus” between children and the market rather than recognizing their intrinsic value. “Prostitution is the prime example of a value (sexual relationship-emotional concern) negated by price.” 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.”

This harm is confirmed by some famous examples of commercialized child entertainers. “Shirley Temple supported a household of twelve, including her parents, throughout her film

\[\text{\textsuperscript{32} Cf. Rochelle Gurstein, The Repeal of Reticence, at 32 (Hill & Wag 1996).}\]
\[\text{\textsuperscript{34} Society cannot leave the task to private individuals in positions to protect these children—parents and program executives—because of the obvious conflict of interest created by that which they have to gain: fame and fortune. See infra page 47 and note 393 and accompanying text.}\]
\[\text{\textsuperscript{35} See Zelizer, supra note 1, at 20 (internal citations omitted). A “commercialization effect” occurs where a product or activity is supplied commercially. See id. Commercial availability diminishes the quality of a product or service by making it available for a price. See id. Combining the home with money turns the family into another commercial setting. See id. at 213.}\]
\[\text{\textsuperscript{36} Id. at 20.}\]
\[\text{\textsuperscript{37} See id. (internal quotations omitted).}\]
\[\text{\textsuperscript{38} See Zelizer, supra note 1, at 20. “[P]ricing necessarily destroys value; the unlimited reach of the market is accepted even by its severest critics.” Id. at 21. It should be impossible to calculate the monetary value of a child because a child is “something precious beyond all money standard[s].” Id. at 57 (internal quotations omitted).}\]
\[\text{\textsuperscript{39} Id. at 20.}\]
\[\text{\textsuperscript{40} See id. at 72.}\]
\[\text{\textsuperscript{41} See Marc R. Staenberg & Daniel K. Stuart, Children as Chattles: The Disturbing Plight of Child Performers, 32 BEVERLY HILLS BAR ASS’N J. 21, 22-23 (Summer/Fall 1997).}\]
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.” 42 “Home Alone” star Macaulay Culkin was the primary source of income for his parents for years. 43 Gary Coleman of “Different Strokes” had to sue his parents to recoup millions of dollars of his earnings. 44

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 1930’s, the birth of five identical girls was an event so rare that it became global news. 45 The Dionne quintuplets “immediately became international celebrities.” 46 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. 47 Claiming a desire to protect the children, the Canadian government took protective custody of the babies. 48 Despite these supposedly good-intentions, however, the government quickly “put the Dionne quintuplets on display as a tourist attraction.” 49 “Thousands flocked to quintland to watch the twice daily showings of the Dionne babies.” 50 The girls lived in “quintland” for the first nine years of their lives unaware that they were generating millions. 51 Souvenir shops opened selling quintuplet-inspired merchandise, and the girls were even featured on various product packaging “from corn syrup to shampoo.” 52 “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. 53 Their parents coerced them to sign away all their earnings. 54

Today, the three surviving Dionne children, who are now penniless, reflect on their past with sorrow. 55 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. 56 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,

42 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.
43 See Staenberg & Stuart, supra note 41, at 22.
44 Id. at 23.
45 Primetime Live, Silvia Chase et al., Once Upon a Time, (ABC News Broadcast Nov. 26, 1997, 10:00 p.m. EST).
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 See id.
53 See id.
54 See id.
55 See id.
56 See id.
which is 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.\(^{57}\) Humans need a secure, private realm in which to cultivate their thoughts, feelings, opinions, and affairs.\(^{58}\) In this space, “a person reveals or realizes his or her authentic self.”\(^{59}\) Freedom over this space enables each person to decide how much or how little she wants to reveal to her community.\(^{60}\) Without such a space, the life lived is constantly in the presence of others, which “provide[s] not so much the occasion for freedom as the opportunity to enact already scripted roles.”\(^{61}\) According to the German sociologist, Georg Simmel, such exposure destroys the individual’s personality value.\(^{62}\)

Because of the importance of privacy to self-actualization, societies have generally maintained boundaries between private and public spheres.\(^{63}\) According to Justice Brandeis and Samuel Warren, a sphere of privacy is essential particularly in the complex life of modern society.\(^{64}\) Familial love or other forms of intimacy cannot quench this need for individual privacy.\(^{65}\) It is necessary in its own right. As a result, Justice Brandeis has declared the right to privacy “the most comprehensive of rights and the right most valued by civilized men.”\(^{66}\)

Though reality programming is a relatively recent phenomenon, enriching oneself by eviscerating the privacy of others is not.\(^{67}\) During the late 1800’s, “invasive and sensational” journalism aroused severe criticism for its “flagrant disregard of privacy.”\(^{68}\) 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.”\(^{69}\) 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.\(^{70}\) Empirical evidence was offered showing that journalism had deteriorated into “gossip-mongering,”\(^{71}\) which was poetically said to “pluck[] off the roof, and pull[] down the walls and sheltering partitions and wantonly lay[] bare all

\(^{57}\) See GURSTEIN, supra note 32, at 9-10. Indeed, the need for privacy has been present for time immemorial. See id.

\(^{58}\) See id. at 18.

\(^{59}\) Id.

\(^{60}\) See id.

\(^{61}\) See id.

\(^{62}\) Id. at 37 (internal quotations omitted).

\(^{63}\) See id. at 12-13.

\(^{64}\) See id. at 19.

\(^{65}\) See id. at 28-29.

\(^{66}\) Id. at 13 (internal quotations omitted).

\(^{67}\) See id. at 33-35.

\(^{68}\) Id.

\(^{69}\) Id. at 34.

\(^{70}\) Id. at 34-35.

\(^{71}\) 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.
defilement and consuming lust of poor human nature." 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 stresses, and perverts all of this to satisfy some producers’ vision of “good television.” This is inherently harmful. Even the United Nations has issued a highly critical report directing the British government to regulate the exploitation of children by reality programming. The report expressed concern that “children’s appearance in TV reality shows may constitute an unlawful interference with their privacy.”

In place of privacy, children in reality programming receive nationally televised personas, which do not always depict them in a positive light. Programs often highlight children’s deficiencies for entertainment purposes. 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. Children encounter many complex emotions for the first time, and cameras should not focus on them while they experience them, or they may grow-up regretting the negative attention. Children may inadvertently fuel the negativity because they feel the pressure to entertain, which further distorts their behavior.

Self-interested producers contribute to this problem by encouraging reality stars to behave more dramatically, while editors splice footage to create characters that hold the audience’s attention.
attention and make good programming. "As reality producers have been forced to reach further to invent something new or exciting, many shows have apparently left reality behind," 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. Producers direct children’s actions, even coaching them to utter specific lines. In this environment, poor “character” depictions are likely. This may have a lasting impact on the child’s self image and public persona.

It may also have a lasting impact on the child’s 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. “Most people no longer understand and want the traditional, idealized model of the child because that model cannot be Peter Sheridan, *Is this the Most Disturbing TV Show Yet?*: It’s a cross between *Lord of the Flies* & *Big Brother*; 40 Children Marooned & Left to Cope by Themselves, 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.

*See* Tara Brenner, Note, *A “Quizzical” Look into the Need for Reality Television Show Regulation*, 22 *CARDozo Arts & Enter.* 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*, Los Angeles Times, at E1, Aug. 31, 2007 [hereinafter *Parents Speak Out*]. “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 Deseret, 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 react[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* at 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.


Maria Elena Fernandez, “*Kid Nation* Puts Hollywood Labor Tension into Sharp Focus: Child Welfare Concerns Add to Union Disputes over Reality Shows*, Los Angeles Times, at A1, Aug. 29, 2007 [hereinafter Hollywood Labor Tension]. In “Kid Nation,” 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 83, at 32 (noting that much drama is manufactured and scenarios orchestrated to create confrontations).


On “*Kid Nation,*” *see infra* page 12, kids faced contests against each other each week that were designed to exacerbate rifts among them and cause conflict. *See* Sheridan, *supra* note 83, at 32. Parents, many of whom may be unfamiliar with the entertainment industry, may not realize that this will occur when they give permission for their children to participate. 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. Parents Speak Out, *supra* note 84, 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.

Cf. *id.* “Programs display what people understand and want or they are cancelled.” *Id.*
supported by their experience or imagination.”

This means children in reality programming may be forced to act more like adults thereby losing the opportunity to experience childhood fully.

The same pressure to create hit shows also affects the shows’ agendas, which frequently expose 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.

“[E]xecutives have begun an all-out race to the bottom in an attempt to lure viewers and the precious advertising dollars they represent.” Each reality program must entice more than the last or else risk fading into oblivion.

“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.”

As a result, reality programs increasingly feature “racier and more extreme premises,” and producers have begun engaging in unethical behavior, to maximize ratings.

Attempting to capitalize on the “voyeuristic allure of family dynamics,” numerous reality shows have continued to push the envelope.

“The newest wave, inevitably, seeks to one-up [its] predecessors, from ‘Kid Nation’ 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.”

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.”

Many of these outlandish concepts are specifically designed to push boundaries, which attracts criticism, creates curiosity, garners media attention, and yields higher ratings.

A CBS executive responsible for “Kid Nation” has freely admitted these intentions.

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.”

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90 Id. at 126.
91 Id.
92 Ugolini, supra note 16, at 69.
93 Id. at 68-69.
94 Id.
95 Id. at 69.
96 Id.
97 See Brenner, supra note 84, at 873-74; Reality TV is Child Abuse, supra note 73. Though “reality” implies unscripted programming, “[a]ll 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.”
98 Lowry, supra note 77, at Television 13.
99 See infra page 12.
100 Lowry, supra note 77, at Television 13.
101 Id.
102 Id.
103 See Is Child Exploitation Legal, supra note 78, at E1.
104 Id.
The 2007 reality show,\textsuperscript{105} definitely “put young kids to the test.”\textsuperscript{106} 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.”\textsuperscript{107} Of the 40 children, twelve were age ten or younger and only one was 15.\textsuperscript{108}

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.\textsuperscript{109} The more reality programming panders to this craving, “the more insatiable [the] craving for something yet more vicious in taste.”\textsuperscript{110} Constant exposure breeds familiarity “until from toleration we go to commission of what we first detested.”\textsuperscript{111} What will future programming bring: “‘Zygote Hotel?’ ‘Feral Child Island?’”\textsuperscript{112} Habituation to such programs “dull[s] people’s judgment” until they “eventually lose the capacity to recognize improprieties.”\textsuperscript{113} Each program thus emboldens the next to go further exposing participants to even more outrageous and dangerous experiences.\textsuperscript{114}

This race to the bottom has caused some to question, “[w]ho the hell would let their kids [participate in] that?”\textsuperscript{115} This query is particularly appropriate considering that the contract parents signed authorizing their children to participate in “Kid Nation” 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 requiring that parents waive all legal claims if their children die, are severely injured, or contract sexually transmitted diseases while filming.\textsuperscript{116}

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

\textsuperscript{105} Lowry, supra note 77, at Television 13.

\textsuperscript{106} Is Child Exploitation Legal, supra note 78, at E1.

\textsuperscript{107} Id.

\textsuperscript{108} Id.

\textsuperscript{109} Cf. id. at 52.

\textsuperscript{110} Cf. id. (internal quotations omitted).

\textsuperscript{111} GURSTEIN, supra note 32, at 51 (internal quotations omitted).

\textsuperscript{112} Lowry, supra note 77, at Television 13.

\textsuperscript{113} Cf. GURSTEIN, supra note 32, at 51.

\textsuperscript{114} Lowry, supra note 77, 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 84, at 82-83. Television constantly needs new material, and it “creates an insatiable need in its audience for novelty and public disclosure.”

\textsuperscript{115} Lowry, supra note 77, at Television 13.

\textsuperscript{116} Sheridan, supra note 83, at 32; Lisa de Moraes, “Kid Nation” Borders Open to a Flood of Bad Publicity, THE WASHINGTON POST, at C07, Aug. 25, 2007.
Such parents, however, may not be the only ones willing to sacrifice their children to the showbiz 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. “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.”

Parents are thus lulled into complacency with promises of fame and money that may quickly blind them to the best interests of their children. So blinded, these parents tend to disregard the very real effect that participating in these shows has on their children. Reality programs place children in emotional situations that have a lasting impact on their psyches. One psychiatrist, commenting on “Kid Nation,” forecast that psychological scars will long endure for the children participants. Some have even argued that “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.”

The invasive journalism of the late 1800’s caused similar deleterious psychological consequences. One of its most devastating impacts was said to be “the psychic damage visited upon the subject of the story.” 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.”

Displaying the intimate details of one’s life disgraces the victim by trivializing the meaning of those details. The events in life that deserve human dignity become cheapened and

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117 Lowry, supra note 77, at Television 13; Sheridan, supra note 83, at 32. Former child star Paul Peterson, who is now a child-rights activist, knows of parents who fund breast augmentations for their 14-year-old girls so that the girls can compete with 18-year-olds for jobs in the entertainment industry. See Staenberg & Stuart, supra note 41, at 22.

118 Is Child Exploitation Legal, supra note 78, at E1.

119 Id.

120 Id.

121 See id.

122 Lowry, supra note 77, at Television 13.

123 Sheridan, supra note 83, at 32.

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

125 Staenberg & Stuart, supra note 41, at 22.

126 See GURSTEIN, supra note 32, at 36.

127 Id.

128 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 83, at 32; Wyatt, supra note 85, at B7. Accidents seem likely and predictable when executives expose children to ridiculous situations designed to create drama.

129 GURSTEIN, supra note 32, at 43.
colloquialized. 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 undoubtedly be significant and important in private . . . is inconsequential and banal when paraded before strangers.”

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.”

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 is not yet fixed. 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.

Because of the unique developmental position of children (even as old as age 16 and 17), they require special protection from the many harms participating in reality programming brings, including the invasion of one’s private sphere and the 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. 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 numerous other aspect of life that were once beyond the

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130 Cf. id. at 57.
131 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.
132 Id. at 42-43 (internal quotations omitted).
134 Id. at 569.
135 Cf. id. at 568-70 (explaining why a 17 year-old who committed a capital crime may not receive the death penalty because to inflict this sentence on a juvenile is unconstitutional).
136 See ZELIZER, supra note 1, at 20-21.
market’s reach. A society that sells its children is a short step from selling all 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 1800’s, reality programming elevates undeserving individuals to public notice squandering attention on the unworthy while suggesting that their actions deserve respect even though they do not. “[B]y perverting the public judgment, indiscriminate publicity deprives men of real value of their proper place in the public estimation.” 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 recent significance, Nadia Suleman secured a reality show to exhibit her fourteen children whom she cannot afford. Her overnight celebrity communicates to society that the path to fame and fortune is to have children one cannot afford and then use those children as a meal ticket. 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. Reality programming routinely exposes the private lives of participants making their most intimate experiences accessible with the simple click of a remote. Over time, access desensitizes feelings of shame at viewing such private moments, which have become non-sacred, non-secret, and commonplace.

Rochelle Gurstein aptly summarizes the consequence of overexposure in her book “The Repeal of Reticence.” “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.”

As audiences numb to witnessing formerly private moments, so do reality-program participants to revealing such moments. “[E]xposure of peculiarly sensitive, intimate, vulnerable

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137 See id.
138 See GURSTEIN, supra note 32, at 47-48.
139 See id. (internal quotations and alterations omitted).
140 See Eight's Enough in New TV Series, supra note 29, at15; see also US WEEKLY, supra note 3, at 60 (quoting Suleman’s lawyer); Starr & Li, supra note 15, at 7.
141 See Sheridan, supra note 83, at 32; Wyatt, supra note 85, at B7.
142 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 84, 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.
143 The elimination of a recognized private sphere in which intimate activities are hidden destroys feelings of shame at exposure to such activities. Cf. POSTMAN, supra note 84, at 16.
144 GURSTEIN, supra note 32, at 52.
145 Id. at 52.
aspects of the self” would normally bring shame. But privacy is the social container for shame: 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 individuals “were not shamed by exposing their own bodily functions to the gaze of others.” As Neil Postman posits in his book, “The Disappearance of Childhood,” this lack of shame was a primary reason childhood was absent: because childhood cannot exist without shame. Postman maintains that “shame rests, in part, on secrets,” which children learn at the appropriate time. 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.

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

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 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 the infliction of psychological wounds from the sale of their privacy.

Further, state laws are insufficient to protect children in reality programming fully because program executives may evade them by filming in states with more lenient laws, thus leaving children in some states more vulnerable than others. The ideal solution to prevent the continued

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146 See id. at 11.
147 Id.
148 POSTMAN, supra note 84, at 16. “In the medieval world, childhood [was], in a word, invisible.” Id. at 18.
149 See id. at 9, 115-18; see also COLIN HEYWOOD, A HISTORY OF CHILDHOOD, at 11 (Polity Press 2006) (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 32 at 18.
150 See POSTMAN, supra note 84, 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.
151 See generally POSTMAN, supra note 84 (arguing that 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, ten-year-old Shirley Temple would replace her childish songs with rock songs and would require a boyfriend with whom to quarrel. Id. at 123.
exploitation of children in reality programming is for Congress to enact a federal statute that clearly protects them.\footnote{152}{Part IV discusses this in more depth.}

\subsection*{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.\footnote{153}{See \textit{Hollywood Labor Tension}, supra note 86, at A1, Aug. 29, 2007.} It has even been described as “‘the sweatshop of the entertainment industry.’”\footnote{154}{Id. (quoting Jeff Hermanson, Assistant Executive Director, Writers Guild of America, West).}

The children engaged to provide such entertainment experience their participation as work. The Gosselin children’s aunt and uncle have reported that the children “‘are very aware of the cameras in their home,’”\footnote{155}{Staff & Wire Reports, \textit{Adam Lambert Keen on Queen, but Won’t Rock Only}, \textit{PITTSBURGH POST-GAZETTE}, at WE-23, May 28, 2009 [hereinafter \textit{Adam Lambert Keen on Queen, but Won’t Rock Only}]; see also \textit{Protect Children on Reality TV}, \textit{TIMES-CALL EDITORIAL}, June 6, 2009, at http://www.timescall.com/editorial/editorial.asp?ID=16468 (last visited June 21, 2009).} and they do not wish to participate in “Jon & Kate.”\footnote{156}{See \textit{Starr & Li}, supra note 15, at 7.} They often cry because they do not want to be filmed.\footnote{157}{Id.} They are unable to relax in their own home because the show has transformed it into a never-ending workplace.\footnote{158}{See \textit{Adam Lambert Keen on Queen, but Won’t Rock Only}, supra note 155, at WE-23; see also \textit{Protect Children on Reality TV}, supra note 87.}

The “Kid Nation” stars also understand this.\footnote{159}{See \textit{Is Child Exploitation Legal}, supra note 78, at E1.} They worked 14-hour days without reprieve while filming.\footnote{160}{Sheridan, supra note 83, at 32.} Many of the children said that the most challenging part of the project was being filmed constantly, even during private moments.\footnote{161}{\textit{Is Child Exploitation Legal}, supra note 78, at E1.} One child initially thought the project sounded like a fun adventure until he arrived and realized it was “annoying” work.\footnote{162}{Id. (internal quotations omitted). Another child confessed that the experience was scary and that he was too young to have participated. Sheridan, supra note 83, at 32.} 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.”\footnote{163}{\textit{Hollywood Labor Tension}, supra note 86, at A1 (internal quotations omitted); see also \textit{Parents Speak Out}, supra note 84, at E1, Aug. 31, 2007 (“CBS lawyers maintain that, like all reality show participants, the children...”)} They argue that participants are merely living in front of the cameras and thus labor laws should not even apply.\footnote{164}{Id.}
An associate professor of communication studies at the University of Iowa and author of a book on reality TV, Mark Andrejevic, thinks this is absurd.\textsuperscript{165} “[W]ork means submitting to conditions that are set by employers in order to generate profit for those employers. . . . [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.”\textsuperscript{166}

Indeed, courts have long agreed that “work” occurs despite no compensation or formal employment.\textsuperscript{167} Because employment in reality programming is labor, the government should regulate it as such.

\textbf{B. A Brief History of Child Labor Laws}

Until the late eighteenth century, children were considered economic assets whose labor was a resource for their parents.\textsuperscript{168} 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.”\textsuperscript{169}

\[\text{[in the reality show ‘Kid Nation’] were not ‘working’ and that the $5,000 payment they received is a ‘stipend’ and not a ‘wage.’}\]

“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.” \textit{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 documentary, 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), \textit{see supra} note 31, and such programs still qualify as documentaries. Further, the 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 not profit.

\[\text{\textsuperscript{164} de Moraes, supra note 116, at C07.}\]

\[\text{\textsuperscript{165} Is Child Exploitation Legal supra note 78, at E1. According to Andrejevic, reality programming has managed a “smooth move” in pretending that it is not work by piggybacking off of documentary filmmaking.} \textit{Id.}\]

\[\text{\textsuperscript{166} Id. (quoting Andrejevic).}\]


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

\[\text{\textsuperscript{168} See John C. Duncan, Jr., \textit{The Ultimate Best Interest of the Child Ensures from Parental Reinforcement: The Journey to Family Integrity}, 83 Neb. L. Rev. 1240, 1268 (2005).}\]

\[\text{\textsuperscript{169} POSTMAN, supra note 84, at xii; see also HEYWOOD, supra note 149, at 121 (explaining that “[d]uring the early modern period, the majority of families sought work for their children as a matter of routine,” and that “hostility to child labour is a comparatively recent phenomenon”).}\]
Concerns then emerged over the health of child workers and the conditions of their employment. By the early 1900’s, children were no longer obliged to contribute to their family’s economic welfare. Children’s occupation shifted from work to school. 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.’”


C. The FLSA Does Not Protect These Children

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

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.

Though no cases address 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

See HEYWOOD, supra note 149, at 134-36.
See Duncan, supra note 168, at 1269.
HEYWOOD, supra note 149, at 155-56.
Id., at 142-43.
See Duncan, supra note 168, at 1269. State laws “were either poorly enforced or unenforceable.” See HEYWOOD, supra note 149, at 142.
See 29 U.S.C. § 212; see also Duncan, supra note 168, 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.
See 29 U.S.C. 202(b); 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, 41 WAYNE L. REV. 1773, 1788 (Summer 1995).
29 U.S.C. § 213(c)(1)(C)(3) (“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.”).
29 C.F.R. § 570.125; see also 22A FED. PROC. L. ED. § 52:1619 (Sept. 2008).
their audience by relating facts, events, and other matters as they go about their daily lives. Because children in reality programming are likely “performers” within the meaning of the FLSA, they are exempt from its protection.\footnote{181}{Webster’s dictionary defines “relating” as “to give an account of (an event, circumstance, etc.). \textit{Random House}, supra note 163, at 1626.}

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.\footnote{182}{See 29 U.S.C. § 213(c)(1)(C)(3).} It is doubtful that they did given that they did not actually define “performer” in the exemption.\footnote{183}{See 81 Cong. Ch. 736, 63 Stat. 910, 917-18 (1949) (amending FLSA to include actor exemption).} 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.\footnote{184}{See id.; 29 U.S.C. § 213.}

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.\footnote{185}{See 29 C.F.R. § 570.125 (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. \textit{See 29 C.F.R.} § 550.1. Section 7(e)(3)(c) addresses the maximum hours employees may work. \textit{See 29 U.S.C.} § 207(e)(3)(c) (explaining that “regular rate” for determining overtime includes all remuneration for employment except, \textit{inter alia}, talent fees).} This is because defenders of the exemption focused on stage acting.\footnote{186}{See \textit{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).} 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.”\footnote{187}{\textit{Id.} at 93.} 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.\footnote{188}{\textit{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. \textit{See id.} at 93. Prior to the enactment of the FLSA, the defense gradually shifted to educational terms. \textit{See id.} (providing that economic arguments were only periodically invoked from 1910-1912, nearly 30 years before the FLSA’s enactment).}
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, New York, 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. 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.

Finally, even if some states enacted such laws, it would not suffice because producers can evade individual state laws by filming in other states. Unlike traditional entertainment, reality programming typically does not require elaborate sets and studios and may occur anywhere. Parents seeking to profit from their children may even move to different states for more favorable laws.

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.

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

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192 See infra Part IV.

193 See supra Part II.

194 See Staenberg & Stuart, supra note 41, 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.”).

195 See id. This is admittedly a fairly extreme evasion tactic.

196 To support this position, argued further in Part IV, this Part canvasses various state laws.
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.\(^\text{197}\) California’s law appropriately became known as the “Coogan” Law.\(^\text{198}\) 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, lost privacy during childhood.\(^\text{199}\)

The Coogan Law has multiple components. First, it describes the entertainment contracts to which it applies.\(^\text{200}\) 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.\(^\text{201}\) Children who enter into such contracts have the legal right to their earnings, unlike children in other occupations whose earnings belong to their parents under California law.\(^\text{202}\)

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.\(^\text{203}\) The parties may petition the court for such approval.\(^\text{204}\) 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

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\(^\text{197}\) See Peter M. Christano, Saving Shirley Temple: An attempt to secure financial futures for child performers, 31 MCGEORGE L. REV. 201, 202-03 (Winter 2000); Staenberg & Stuart, supra note 41, 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.

\(^\text{198}\) See Christano, supra note 197, at 202; Staenberg & Stuart, supra note 41, at 23; see also ZELIZER, Pricing the Priceless Child at 111.

\(^\text{199}\) See supra Part II.

\(^\text{200}\) See CAL. FAM. CODE § 6750.

\(^\text{201}\) See CAL. FAM. CODE § 6750(a)(2). It also covers contracts for which minors agree to sell their likeness. See id. No California cases appear to address whether Coogan Law applies to reality programming, but the provision’s plain language suggests that it does, cf. Laimé 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 Coogan Law and recounting “familiar rule of statutory construction that statutes should be given a common sense meaning”).

\(^\text{202}\) See CAL. FAM. CODE § 771(b); Cal. Fam. Code § 7500(c); see also 32 CAL. JUR. 3D. FAM LAW § 301; Christano, supra note 197, at 206-07. Sections 771(b) and 7500 both provide that children’s earnings are the property of their parent’s unless they are from a child-performer contract under Section 6750. See CAL. FAM. CODE §§ 771, 7500.

\(^\text{203}\) CAL. FAM. CODE § 6751(a). Prior to this, children often attempted to use their minor status to void employment contracts, claiming incapacity. Christano, supra note 197, at 203. Entertainment-industry employers 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.

\(^\text{204}\) CAL. FAM. CODE § 6751(b).
that appointment of a different individual as guardian ad litem is required in the best interests of the minor."  

Second, the law mandates the creation of a trust for the child entertainer’s earnings into which 15% of gross earnings must be set aside for her benefit. Absent court order, no person may withdraw any money from the trust until the beneficiary turns 18 or is emancipated. At least one parent or legal guardian is appointed trustee unless the best interests of the child require otherwise. Employers must deposit the funds directly into the trust, which the trustee has a continuing duty to manage. 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.

Though California’s Coogan Law is fairly protective of minors, it is rather one dimensional in its economic focus. It fails entirely to address the psychological harm child actors are often forced to endure. Further, it leaves children in other states vulnerable. 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.” This is especially true for children in reality programming.

ii. New York

New York generally modeled its law after California’s. 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.

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

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205 CAL. FAM. CODE § 6751(d).
206 See Cal. Fam. Code §§ 6752(b)(1), 6753(a). Such a trust is required even if the contract never receives court approval pursuant to Section 6051. See § 6752(d)(1).
207 See CAL. FAM. CODE § 6753(b). Upon turning 18 years old, the beneficiary may remove the funds. Id. § 6752(b)(2).
208 CAL. FAM. CODE §§ 6752(b)(4), (6), 6753(d). The trustee must provide the employer with a statement containing the information necessary to make the required deposit. See CAL. FAM. CODE § 6753(c). If the trustee fails to do this within the required time, the employer shall forward the 15% 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). Trustee duties also include providing a yearly accounting in accordance with California’s Probate Code. CAL. FAM. CODE § 6752(b)(6).
209 CAL. FAM. CODE § 6752(b)(7).
210 Christano, supra note 197, at 209.
211 Id.
212 See Munro, supra note 191, at 554.
213 These harms are set out in Part II supra.
connection with the making of a motion picture. It is also unlawful for parents to permit such employment. The provision states, however, that it does not apply when the child is in a private home.

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

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. Such court approval also prevents children from disaffirming contracts because of infancy. During the approval process, the court sets an amount of earnings to be set aside in the best interests of the child. The child’s guardian holds the earnings for the child until she reaches majority or until further court order. The child must personally participate in the proceedings,

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

216 N.Y. ARTS & CULT. AFF. LAW § 35.01(1)

217 See N.Y. ARTS & CULT. AFF. LAW § 35.01(2). 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.

218 N.Y. LAB. LAW § 151(1)(a); see also McKinney’s Arts & Cultural Affairs Law § 35.01(3).

219 N.Y. LAB. LAW § 151(1)(c)(iii).

220 N.Y. LAB. LAW § 151(1)(e).

221 See N.Y. ARTS & CULT. AFF. LAW § 35.03(1).

222 See N.Y. ARTS & CULT. AFF. LAW § 35.03(1); 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.”). 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).

223 N.Y. ARTS & CULT. AFF. LAW § 35.03(3)(b). 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)

224 See N.Y. ARTS & CULT. AFF. LAW § 35.03(7), (3)(a); see also 21 CARMODY-WAIT 2D § 124:72.
and the court makes such orders necessary in the child’s best interest.\textsuperscript{225} If while performing under the contract, the child’s wellbeing 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.\textsuperscript{226}

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% of the gross earnings into a trust account, which the child’s guardian creates.\textsuperscript{227} A parent or legal guardian must show maintenance of a trust account for renewal of the performer permit.\textsuperscript{228} The child’s parent or guardian ad litem may request that the employer transfer more than 15%.\textsuperscript{229} Parents or legal guardians may serve as trust custodians, but if the account balance reaches $250,000, a trust company must take over.\textsuperscript{230}

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 features the children in their home,\textsuperscript{231} 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.\textsuperscript{232}

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.\textsuperscript{233} Artistic or creative services include “services as an actor, actress . . . or other performer or entertainer.”\textsuperscript{234} “[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.

\textsuperscript{225} N.Y. ARTS & CULT. AFF. LAW § 35.03(8)(a).
\textsuperscript{226} See N.Y. ARTS & CULT. AFF. LAW § 35.03(2)(e). To prevent revocation, the parties may agree to court-approved modification of the contract. \textit{Id}.
\textsuperscript{228} N.Y. LAB. LAW § 151(4)(a).
\textsuperscript{229} N.Y. LAW § 7-7.1(2)(b).
\textsuperscript{230} \textit{Id}.
\textsuperscript{231} \textit{See Multiple Challenges: Parents of twins, triplets, quadruplets & more need to strike a balance}, Pittsburgh Post-Gazette, June 29, 2009, at Lifestyle C-1 (noting that “Jon & Kate” is filmed at the family’s home).
\textsuperscript{232} \textit{See supra} note 217 and accompanying text.
\textsuperscript{233} N.Y. LAB. LAW § 150(1), (2).
\textsuperscript{234} N.Y. LAB. LAW § 150(1).
The contract-approval provision also does not clearly include children performing services in reality programming.\textsuperscript{235} 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 in professional sports.”\textsuperscript{236} 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.\textsuperscript{237} That provision extends to contracts for children’s likenesses or stories of their lives, which squarely cover reality programming.\textsuperscript{238}

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 New York and California. It too provides for judicial approval of certain types of entertainment contracts.\textsuperscript{239} 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.”\textsuperscript{240} It also applies where minors receive compensation for the use of their right of publicity,\textsuperscript{241} or where they exploit literary, musical, or dramatic properties.\textsuperscript{242}

Because children in reality programming are not exploiting literary, musical, or dramatic properties in the ordinary sense\textsuperscript{243} nor are they providing services as an actor, dancer, musician, vocalist, model, stunt person, or conductor,\textsuperscript{244} the right-of-publicity provision seems most

\\textsuperscript{235} See N.Y. ARTS & CULT. AFF. LAW § 35.03(1).
\textsuperscript{236} See id.
\textsuperscript{237} Compare N.Y. LAW § 7-7.1(1)(b) (contained in Article 7 and extending to contracts for children who agree to the use of their likeness or story of their life), \textit{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).
\textsuperscript{238} See N.Y. LAW § 7-7.1(1)(b).
\textsuperscript{239} See FLA. STAT. ANN. § 743.08(1).
\textsuperscript{240} See FLA. STAT. ANN. § 743.08(1)(a).
\textsuperscript{241} See FLA. STAT. ANN. § 743.08(1)(c).
\textsuperscript{242} See FLA. STAT. ANN. § 743.08(1)(d).
\textsuperscript{243} 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.
\textsuperscript{244} This provision also applies to children rendering “other performing artist services.” See FLA. STAT. ANN. § 743.08(1)(a). Depending on how this 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.
appropriate here. Upon further examination, however, even the right-of-publicity provision likely does not 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. Section 540.08 explains that the right of publicity extends to one’s “name, portrait, photograph, or other likeness.” Precedent interpreting Section 540.08 shows that this generally will not protect children in reality programming.

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. 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. 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. It is therefore unlikely that the statute for judicial approval of contracts covers contracts for participation in reality programming, which is not commercial speech.

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. The petition shall include a statement regarding the employment and compensation. The petition must also include facts 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,” it may still be interpreted to extend to participation in reality programming, but no Florida cases have done so.

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245 See FLA. STAT. ANN. § 743.08(1)(c).
246 See FLA. STAT. ANN. § 540.08(1).
247 See, e.g., *Tyne v. Time Warner Entm’t Co.*, 901 So.2d 802, 806-10 (Fla. 2005).
248 See id. at 806-08.
249 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. App. Div. 4 Dist. 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”).
250 See *Tyne*, 901 So.2d at 808-10.
251 See infra note 426.
252 See FLA. STAT. ANN. § 743.09(1)(a).
253 See FLA. STAT. ANN. § 743.09(2)(d).
known that show that the “contract is reasonable and provident and for the best interests of the minor.”

At any time after a petition is filed, the court may appoint a guardian ad litem to represent the interests of the minor. 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.”

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. If a contract is approved, all earnings from the contract belong to the minor.

There are many reasons for which a court will not approve such a contract. For instance, it will not approve a contract if federal or state child-labor law prohibits the employment. 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. The court sets this amount in the best interests of the child. A guardian of the property holds the set-aside earnings.

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254 See FLA. STAT. ANN. § 743.09(2)(i). 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.

255 FLA. STAT. ANN. § 743.09(3).

256 See id. (emphasis added).

257 See FLA. STAT. ANN. § 743.08(3)(a).

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

259 See FLA. STAT. ANN. § 743.08(c)-(e).

260 See FLA. STAT. ANN. § 743.08(c).

261 See FLA. STAT. ANN. § 743.095(1)(a).

262 See FLA. STAT. ANN. § 743.095(1)(b). 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.

263 See FLA. STAT. ANN. § 743.095(2)(a). A parent or guardian is not ineligible for appointment as property guardian simply because of an interest in the property as long as the interest is fully disclosed to the court. FLA. STAT. ANN. § 743.095(2)(b). 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). 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 (enumerating powers of guardian upon court approval); see also FLA. STAT. ANN. § 744.444 (enumerating powers of guardian without court approval).
Once the court approves a contract, it may revoke its approval for many reasons, including that “the physical or mental wellbeing of the minor is being impaired by the performance thereof.”264 The minor, her parents, her guardian, or a guardian ad litem appointed for this purpose may move the court to revoke its approval.265

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.266

2. Other States

Other states also have laws applicable to child performers.267 They vary in scope and purpose.268 Some have intricate laws like California’s Coogan law.269 As with California, New York, and Florida, the extent to which these states’ laws protect children in reality programming is unsettled.270 The laws examined here generally fail to provide the clear and expansive

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264 See FLA. STAT. ANN. § 743.08(f); see also supra note 254.
265 See FLA. STAT. ANN. § 743.08(f).
266 See supra Part II; infra Part IV(B)(1).
267 See, e.g., MASS. GEN. LAWS ch. 231 § 85P 1/2; VT. STAT. ANN. tit. 21, § 434; ALA. CODE § 25-8-60, Amended by 2009 Alabama Laws Act 2009-565 (H.B. 144); ARK. CODE ANN. § 11-12-104; N.D. CENT. CODE § 34-07-01; ALASKA STAT. § 23.10.330(b); 8 ALASKA ADMIN. CODE §§ 05.300, 05.340.
268 See infra pages 30-33 and accompanying footnotes.
269 See, e.g., KAN. STAT. ANN. §§ 38-615 - 622 (covering employment of child entertainers); NEV. REV. STAT. §§ 609.400-609.570 (covering contracts for creative or athletic services of minors); N.C. GEN. STAT. §§ 48A-11 – 18 (same); TENN. CODE ANN. §§ 50-5-201 – 222 (containing “Tennessee Protection of Minor Performers Act”).
270 For example, the extent to which Arkansas law protects children in reality programming is uncertain. Arkansas’s law provides that no child under 16 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). 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. Cf. ARK. ADMIN. CODE. 010 14 001 § 2.300(b) (listing occupations Director deems “injurious to the health or morals of children under sixteen,” and none come close to participating in reality television); cf. also supra note 254.

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 fourteen from working in any occupation subject to a few exceptions. See N.D. CENT. CODE § 34-07-01. 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 fifteen-year-old worked for his father’s company, which owned and operated transportable carnival rides, but 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. The commissioner also may prohibit minors from
protection needed to protect children from exploitation by reality programming and from infliction of the psychological harms attendant to participating in such programming.271

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 general protection afforded children in other occupations.272 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 90 days during the school year.273 Though this addresses one important concern, education, it is far from comprehensive protection for these children, and

employment that is dangerous to their health, safety, or welfare. Id.; see also N.D. CENT. CODE § 34-07-16(13). 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 254. 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 (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. 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) (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) (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 217 and accompanying text. Another Massachusetts law may also apply to children in reality programming. See MASS. GEN. LAWS ch. 149 § 104. That provision prevents employing children under age 15 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.

271 See supra Part II.

272 See VT. STAT. ANN. tit. 21, §§ 432(3) (requiring that children under sixteen obtain a certificate from a physician stating that they are fit to perform the proposed occupation but enabling children performers to obtain waivers), 434 (providing that children under sixteen may not work past nine o’clock at night, 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), 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 (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).

273 See VT. STAT. ANN. tit. 21, § 432(4).
it certainly does not address the psychological harms these children face from participating. 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” is filmed, has labor laws that apply to children, but the extent to which they protect children in reality programming remains unclear. One provision provides that no child under sixteen “shall be employed or permitted to work in, about, or in connection with, any establishment or in any occupation.” 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, and there is no universal rule. It is thus difficult to predict whether children simply living life before cameras are working within the meaning of the statute, though arguably they are. The Pennsylvania Department of Labor is currently investigating whether “Jon & Kate” violates state labor law.

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274 See supra Part II.
275 See, e.g., 43 PA. CONS. STAT. §§ 42, 48.1.
276 Pennsylvania was among the first states to enact child labor laws, but they were initially poorly enforced. See HEYWOOD, supra note 149, at 142.
277 43 PA. CONS. STAT. § 42. “[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. CONS. STAT. § 41. “[D]omestic service” is not defined. See id. “[O]ccupation,” which appears in section 42, is also undefined. See id.
278 See Commonwealth of Pa. v. McKaig, 29 Pa. D. & C. 629, 631 (Ct. of Quarter Sessions of Pa., Philadelphia County 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 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 (“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.”). 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 seven and older to participate in productions where it is not hazardous to their health or well-being. See 43 PA. CONS. STAT. § 48.1(a); see also 34 PA. CODE § 11.3(c). 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 254 and accompanying text. For minors under seven, 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. CONS. STAT. § 48.1(a.1) (authorizing 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).

280 See Noveck, supra note 15, at Lifestyle. The McKaig case involving the child ice skater suggests that the investigation will find that the Gosselin children are 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 McKaid 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 (Aug. 31, 1978) (explaining that in McKaid, the court was “fearful of the situation where a
In Georgia, the pertinent statutes expressly exempt children employed as actors or performers from protection. 281 The Labor Commissioner must consent for the exemption to apply. 282 The Commissioner considers whether the environment is proper for the minor; whether the conditions of employment are detrimental to the minor; whether the minor’s education will be neglected; and, whether the minor will be used for pornographic purposes. 283 One might argue to the Commissioner that the employment conditions surrounding reality programming are clearly detrimental to children, 283 but it is not clear whether such an argument would prevail. 285

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. 286 Montana also exempts children employed by their

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


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

284 The Commissioner may rescind its consent. GA. COMP. R & REGS. R. § 300-7-1-.09.

285 Cf. supra note 254 and accompanying text.

286 See MONT. CODE ANN. § 41-2-104(5). 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. LABOR CODE ANN. § 51.012 (“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 14 unless an exemption applies and citing exemptions). The Texas Workforce Commission has authorized employment of child actors under 14 subject to some non-rigorous limitations. See 40 TEx. ADMIN. CODE §§ 817.31 (requiring compliance with administrative code subchapter to employ child actors under 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) (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. also supra note 254 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. LABOR CODE ANN. §§ 51.003(a)(1) (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
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.

Children in reality programming receive varying protection depending on the state law that applies. 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 they protect children in reality programming is far from clear. What is clear is that these laws fail to provide the scope of protection for children needed here. Further, variability among state laws makes them susceptible to forum shopping. 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 ideal 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, which would result in total 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. LABOR CODE ANN. §§ 51.003 (a)(6). Texas law has not established whether participation is “nonhazardous.” See, e.g., TEX. LABOR CODE ANN. § 51.014 (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).

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) (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 (stating that earnings accumulated under contracts set forth in 38-618 are sole legal property of minor), 38-619 (providing for court approval of such contracts), 38-20(b)(1) (mandating creation of trust for percentage of minor’s earnings).

Alaska law expressly exempts minors employed in the entertainment industry from labor-law protection. See ALASKA STAT. § 23.10.330(b). But, its administrative regulations offer some protection. See 8 ALASKA ADMIN. CODE §§ 05.300 (requiring permit for minor to work in entertainment industry), 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”), 05.315 (requiring as a prerequisite for issuing a permit that the minor receives a studio teacher in certain circumstances), 05.340(a)(1) (prohibiting minors from working in 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 254 and accompanying text.

See infra Parts II, IV.

See infra Part IV.
prohibition for the vast majority of minors. This option provides the most protection for children while avoiding the pitfalls inherent in the other options.

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 is, however of course, unlikely. Further, even if states were to enact statutes, they will inevitably vary, particularly as courts interpret them. Courts in one jurisdiction are not bound to interpret their laws consistent with other jurisdictions’ laws. 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 programs do not require elaborate production studios or sets and can occur everywhere. 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. 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. “In California or New York they would never have gotten away with this.” The show’s creator even admitted that he avoided including children from New York or California in the show because of potential labor issues.

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

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291 The sliding scale is discussed more below.
292 States may, of course, choose to interpret them similarly particularly if the statutes are identical.
293 For example, the Gosselins live in Pennsylvania while the family starring in “Table of 12” lives in New Jersey. See The Jon & Kate Debate, supra note 13, at L9; Jon, Kate: Hometown Antitheroes, THE 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, NEW YORK DAILY NEWS, June 4, 2009, at 77.
295 See Sheridan, supra note 83, at 32; de Moraes, supra note 116, at C07. Shortly after the filming of “Kid Nation,” the New Mexico legislature tightened the law. de Moraes, supra note 116, at C07. Other states could of course follow suit, but waiting for each state with lenient laws possibly 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 254 and accompanying text.
296 Sheridan, supra note 83, at 32 (quoting Kim Talman of the National Association to Protect Children).
comprehensive protection for these children.\textsuperscript{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.”\textsuperscript{299}

As long as some states provide safe harbor for these shows, the nation’s children will not be safe. Because of the nature of the reality 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.

\textbf{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, however, 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 paid or employed to be filmed for profit (whether funds are paid to them or others) as they engage in purportedly unscripted activities.\textsuperscript{300} It would encompass whatever media is used to disseminate such programming, such as television (cable and broadcast), movies, DVDs, and the internet.\textsuperscript{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 fifteen, no participation; at ages sixteen and seventeen, participation is permissible subject to regulation regarding conditions of employment; at age eighteen and over, no

\textsuperscript{298} Exceptions may of course exist. For example, Kansas is not necessarily an entertainment hub, but its laws protecting child performers offer fairly comprehensive protection. \textit{See supra} n. 269 and accompanying text.

\textsuperscript{299} \textit{See, e.g., Hollywood Labor Tension, supra} note 86, 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 to which viewers could relate).

\textsuperscript{300} \textit{See supra} note 31.

\textsuperscript{301} \textit{See id.} In crafting this definition, the author attempts to ensure that it is sufficiently narrow so as not 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. \textit{See infra} Part V.
regulation. This option is ideal because it enables Congress to enact a clear statute with an express pronouncement regarding employment of children in reality programming.  

2. Second-Best Possibilities

Congress need not enact a free-standing statute expressly regulating children in reality programming to address the issue. 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. But this proposed solution is overly broad and under-inclusive. It is overbroad because it will result in all child performers receiving FLSA coverage, yet all child performers are not subject to the same harms as children in reality programming. Additionally, because the exemption for child performers has endured for many years, this may not gain favor. 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. To avoid an interpretational quagmire that requires further clarification, the more direct option offered above is preferred.

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 five), and/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.

303 See supra Part III(C).

304 See 29 U.S.C. §§ 212(c) (“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.”), 203(l)(1) (defining “oppressive child labor” to include, inter alia, employment of anyone under 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 between sixteen and eighteen); see also §§ 29 C.F.R. 570.117 (elaborating on “oppressive child labor”), 570.58-68 (setting forth hazardous activities for children sixteen to eighteen, and none resemble participation in reality programming), 570.120 (same). But see 29 U.S.C. § 203(l)(2) (granting Secretary of Labor power to permit employment of children fourteen to sixteen in certain occupations); see also, e.g., 29 C.F.R. § 570.34 (detailing permitted occupations for minors between fourteen and sixteen 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.
Second, the Secretary of Labor could amend the definition of “performer” so that it expressly excludes participation in reality programming. This would result in a similar outcome as the first option because it would cause the FLSA to apply to these children by expressly eliminating the exemption for them. It is narrower than the first choice because it would not eliminate the exemption for all child performers but would instead only exempt children in reality programming from the performer exemption—an exemption to the exemption. But this solution suffers from a similar infirmity as the first 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. This is inadequate here, however, because solidifying such a right will not prevent children from participating in reality programming. It will 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 of participating in reality programming.

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. It is also a proper exercise of government authority under the Constitution.

V. A FEDERAL STATUTE WILL NOT VIOLATE THE CONSTITUTION

305 See 29 C.F.R. § 570.125. The Secretary chose to follow the definition of “performer” provided in another regulation. See id. It could choose to amend that definition.

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

306 Solutions requiring exemptions to exemptions seldom bring clarity.

307 See generally Sara Kimball, Comment, A Family Affair: Extending the Right of Publicity to Protect Celebrity Children, 18 SETON HALL J. SPORTS & ENTERTAIN. 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 a similar state right).

308 See supra Part II. It is also undesirable as matter of public policy to fashion a solution that encourages children to sue their parents. Yet parents are who children would likely sue, assuming no parental immunity, see RS 2d Torts § 895G, Comment (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 are entering into contracts with parents who are agreeing 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.

309 See infra Part V.
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. It may enact a related law to regulate employment of children in reality programming.

The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce among the several states. Congress has the authority to regulate in three general areas. First, “the Commerce Clause gives Congress authority to ‘regulate the use of the channels of interstate commerce.’” 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.” Third, it grants Congress the power to regulate activities that “substantially affect interstate commerce.” Because a statute prohibiting employment in reality programming targets participation wherever it occurs, the third test is most appropriate.

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310 See supra n.178 and accompanying text.
311 “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).


312 U.S. Const. Art. 1, § 8, cl. 3.
313 Gonzales v. Raich, 545 U.S. 1, 16 (2005).
315 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 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) (en banc) (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)).
316 Gonzales, 545 at 17. “In assessing the scope of Congress' 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.”)

317 Cf. United States v. Morrison, 529 U.S. 598, 609 (2000) (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).
Pursuant to its Commerce Clause power, Congress can prescribe rules to govern commerce. This power extends not only to “regulations which aid, foster and protect the commerce,” but it also “embraces those [regulations] which prohibit [commerce].” The proposed statute would do both. It would prohibit employment of children of 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. The modern interpretation of Congress’s power under the Commerce Clause is “expansive.” “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.”

According to the Supreme Court, the Commerce Clause grants Congress the power to enact statutes that regulate economic matters. “Economics’ refers to ‘the production, distribution, and consumption of commodities.” 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. 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. “[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”

Congress’s Commerce Clause power also enables Congress to regulate employment. “This power extends to ostensibly intrastate economic activity that has a cumulative substantial

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318 United States v. Darby, 312 U.S. 100, 113 (1941).
319 Id.
320 See United States v. Morrison, 529 U.S. 598, 607 (2000); United States v. Miss. Dep’t of Public Safety, 321 F.3d 495, 500 (5th Cir. 2003) (noting time-honored presumption that dually enacted statute is proper exercise of Congress’s legislative power).
322 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964) (internal quotations omitted).
324 Gonzales, 545 at 25 (quoting dictionary).
325 See Morrison, 529 U.S. at 611.
326 See Morrison, 529 U.S. 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 Morrison, 529 U.S. at 610. This is because “[t]he Constitution requires a distinction between what is truly national and what is truly local.” Id. at 617.
327 Id. at 613.
328 See Adams v. Suozzi, 433 F.3d 220, 225 (2d Cir. 2005).
effect on interstate commerce.”329 The Second Circuit has thus held that “no extended discussion is required to show that employment agreements . . . evidence a transaction involving commerce.”330 The Fifth Circuit has agreed that Congress has the power to regulate labor.331 As it explained, “the Supreme Court has recognized that effects on employment affect commerce.”332 According to the Fifth Circuit, there is a “national labor market,” thus labor and employment substantially affect interstate commerce.333 Indeed, numerous statutes involving labor and employment have survived Commerce Clause scrutiny.334

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.335 The link between such employment and interstate commerce does not require piling inferences upon inferences: it is quite clear.336

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.

329 Id.; see also United States v. Miss. Dep’t of Public Safety, 321 F.3d 495, 500-01 (5th Cir. 2003).
330 Adams, 433 F.3d at 225 (internal quotations and modification omitted).
331 See Miss. Dep’t of Public Safety, 321 F.3d at 500-01.
332 Id. at 500.
333 See id. at 500-01.
334 See, e.g., Okla. Press Publishing 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); N.L.R.B. 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 Public Safety, 321 F.3d 495, 500-01 (5th Cir. 2003) (finding enactment of Americans with Disabilities Act is proper exercise of Congress’s commerce power and supporting conclusion with Supreme Court precedent); E.E.O.C. v. Ratliff, 906 F.2d 1314, 1315-16 (9th Cir. 1990) (noting that Title VII is a proper exercise of Congress’s Commerce-Clause power).
335 Cf. Miss. Dep’t of Public 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’s authority to regulate the airwaves) because it proposes that Congress enact a labor statute. Further, the proposed statute would apply irrespective of whether the reality programming reaches the public via the airwaves (e.g., through broadcast or cable) or whether it reaches the public solely 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., F.C.C. v. League of Women Voters, 468 U.S. 364, 376 (1984) (stating that Congress’s commerce power to regulate the broadcast medium is well established).
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.” 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. Because interstate communication is interstate commerce, the Court held, the AP is subject to the National Labor Relations Act.

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, and Congress therefore has the power to regulate employment in it.

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

338 Id. at 126-27. Additionally, the New York office operated the foreign service, which had staff and offices throughout the world. Id. at 126.
339 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.
340 Cf. id. at 128-29.
342 See, e.g., JON GOSSelin ET AL., MULTIPLE BLESSINGS (Zondervan 2008); see also TORI SPELLING, MOMMYWOOD (Simon Spotlight Enter. 2009); JIM BOB DUGGAR & MICHELE DUGGAR, THE DUGGARS 20 & COUNTING! RAISING ONE OF AMERICA’S LARGEST FAMILIES—HOW THEY DO IT (Howard Books 2008).
343 Cf. Morrison, 529 U.S. at 611-12 (noting that Congress’s failure expressly to limit statute in this fashion was consideration in finding statute exceeded Congress’s 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.
This provision indicates Congress’s intent to exercise its commerce authority as broadly as constitutionally permissible. Congress has done this with another labor statute, Title VII. Title VII provides that it applies to employers in industries “affecting” interstate commerce. By applying the statute to activities that “affect,” interstate commerce, Congress signaled its intent to act with the broadest commerce power possible. Courts understand and respect this. As one court explained, “[t]he ‘affects commerce’ jurisdictional obstacle is very low indeed.” Congress should include a similar jurisdictional provision 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’s 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. The government 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 1920’s, 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. As with other fundamental rights, the Court protects this right with the most

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344 *Cf.* Ratliff, 906 F.2d at 1316 (stating that Congress worded Title VII to accomplish a similar result).
345 See *id.*
347 See *Ratliff*, 906 F.2d at 1316.
348 *Id.* If an employer even serves individuals from out of state, it may be satisfied. See *id.* (citing S.D.N.Y. case where court held law firm is an “employer” under Title VII because it did business with national and international clients).
350 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. Neb., 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, 572-73 (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 Wash. 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 350, 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. amendment XIV, cl. 1. The Fifth Amendment contains a comparable
stringent Supreme Court standard\textsuperscript{351} by strictly scrutinizing government interference with this right.\textsuperscript{352} Laws survive strict scrutiny only where narrowly tailored to serve compelling government interests.\textsuperscript{353}

The Supreme Court has reaffirmed the importance of the right to parent one’s children.\textsuperscript{354} In \textit{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.”\textsuperscript{355} The state follows this doctrine of “parental autonomy” when it defers to parents, often pursuant to their liberty interest in raising their children.\textsuperscript{356}

Parental rights are also protected because society assumes “as a general matter, parents provide best for their children.”\textsuperscript{357} 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.\textsuperscript{358}

\begin{itemize}
\item[355] \textit{Id.}; \textit{see also} \textit{Troxel}, 530 U.S. at 65-66 (stating same).
\item[356] Cosby, \textit{supra} note 350, at 287-88.
\item[358] See \textit{Troxel}, 530 U.S. at 69-70 (“[S]o long as a parent adequately cares for his or her children (\textit{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, \textit{supra} note 350, at 291-93.
\end{itemize}
Parental rights are not limitless, however. The state has a “compelling” interest in protecting minors’ physical and psychological well-being. 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.” 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.” When a child’s welfare is threatened, the state may even terminate parental rights. A child may also seek to have her own parents’ rights terminated and become emancipated.

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

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359 See Prince v. Mass, 321 U.S. 158, 166 (1944); 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 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) (Brennan, J., concurring) (“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. Cmt’y 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).


361 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).

362 See Cosby, supra note 350, at 292.

363 See Duncan, supra note 168, 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).


365 Cosby, supra note 350, at 287.


367 Bartlett, supra note 357, at 470 (Summer 1999). “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
Children’s best interests are also important in financial matters. To protect these interests, a court may interfere with a parent’s right to act on behalf of her children. 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. In such instances, a judge may appoint a guardian ad litem to represent the children’s financial interests against the parent. 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.”

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.”


See id.; see also Cosby, supra note 350, at 287; Dep’t of Soc. Servs. v. Phillips, 618 S.E.2d 922, 923-24 (S.C. App. 2005) (stating that 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 366, at 88.

At times, the best interests of the child conflict with parental autonomy. See Cosby, supra note 350, 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. at 289.


See id.

See id.; Novack v. Chait, 575 A.2d 908, 912-13 (N.J. Sup. Ct. 1990) (holding trial court should have appointed guardian ad litem to represent child instead of child’s mother because mother had conflict of interest); see also Horacek v. Exxon, 357 F. Supp. 71, 74 (D.C. Neb. 1973); Stewart v. Superior Court, 787 P.2d 126, 127 (Ariz. App. 1989); 43 CJS Infants §§ 41, 322, 329. 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.


See Stewart v. Superior Court, 787 P.2d 126, 127 (Ariz. App. 1989); see also 43 CJS § 319 (“A court has broad discretion to 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).

The Court explained this in *Prince* when it upheld Massachusetts’s child labor law against attack by a child’s guardian who claimed it violated her freedom of religion and Due Process right to parent her child.\(^{375}\) 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 an [sic] matters of employment.”\(^{376}\) 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 places . . . \(^{377}\)

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.”\(^{378}\) The government thus has expansive power to limit parental freedom\(^{379}\) and control parental discretion.\(^{380}\)

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 currently live their lives in a media fishbowl.\(^{381}\) They “will not only know of their dad’s alleged affair, but all the dirty details.”\(^{382}\) There is no way to measure adequately the full extent of the harm this has inflicted, and will continue to inflict, on these children.\(^{383}\) Yet, their parents ignore this harm, exploiting their children for their own self interests.\(^{384}\)

\(^{375}\) See *Prince*, 321 U.S. at 159-69.

\(^{376}\) *Id.* at 168.

\(^{377}\) *Id.*

\(^{378}\) 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.

\(^{379}\) *Id.* at 167.

\(^{380}\) 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.

\(^{381}\) See *Salamone*, supra note 17, at 22.

\(^{382}\) *Id.*

\(^{383}\) See *id.*

Despite recently 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.” There is no sign they will terminate their show despite that the turmoil may weigh even heavier on their children if forced to experience the pain of divorce publicly. This is not terribly surprising. Perhaps the Gosselins realize that divorce brings drama, which means even higher ratings, which equals money. Rather than end the show for the sake of their family, they will capitalize on the ending of their family for the sake of the show.

As long as an audience is interested in voyeuristically witnessing the disintegration of this family, the parents evidently will supply the fodder. Profit potential reigns supreme. The parents ignore the best interests of their young children, despite that their interests are sorely in need of attention—especially at a difficult time in their lives.

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. 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.

“Overexposure is the flip side of neglect.” Selling children and their privacy is child abuse. “Certainly, there can be no pretense at education or spiritual elevation. This is pure, unconscionable, abuse of parental power and influence.”

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385 In Brief, THE ATLANTA JOURNAL-CONSTITUTION, at 1D, June 24, 2009. Though the show took a short hiatus after the divorce announcement, the couple has said that they intend to continue their show despite their divorce. See id.
386 See id.
387 See Maureen Ryan, Jon & Kate Plus Divorce Papers, CHI. TRIBUNE, 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.’”).
388 Id.
389 Id.
390 The Jon & Kate Debate, supra note 13, at L9.
391 Reality TV is Child Abuse, supra note 73.
392 See id.
the American Academy of Child and Adolescent Psychiatry, agrees that such over-exposure constitutes abuse. 393

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. 394 That parents have much to gain while their children have much to lose renders parents inappropriate gatekeepers to 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, 395 “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.’” 396 Parents do not have the authority to “pimp” their children, yet that is what is happening. 397 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.” 398 It must stop.

Because parents are too self interested to act responsibly, the government must intervene. 399 “‘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 kid-star advocacy group A Minor Consideration. ‘Somebody has to stand up to them and say, ‘You can’t do this to

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393 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.” The Jon & Kate Debate, supra note 13, at L9 (internal quotations omitted). There were also reports that children were subjected to abuse while participating in “Kid Nation.” See Hollywood Labor Tension supra note 86, at A1.

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

395 See Reality TV is Child Abuse, supra note 73.

396 Id.

397 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.

398 Reality TV is Child Abuse, supra note 73.

399 One commentator, however, doubts that reality programming will capture politicians’ attention. See Lowry, supra note 77, 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 step up and do the right thing - kill ‘Jon & Kate Plus 8,’” because it is broken, see Huff, supra note 293, at 77, there is no sign that they will, see Tony Allen-Mills, supra note 10, at News 26. As one TLC representative admitted, the show will go on “‘as long as interest continues and the family wants to do it.’” See id. (quoting TLC representative).
children anymore.” The numerous reality programs featuring children reveal that parents are unwilling to do this. 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 that does not violate Due Process. It serves a compelling interest: regulation of employment to protect the psychological, emotional, and physical wellbeing 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 Amendment 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 should not automatically trump principled discussion about the propriety of such regulation. 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.” The law proposed here regulates exploitation of children against serious harm that participating in reality programming causes. This neutral regulation will not violate the First Amendment rights of those whom it regulates: reality program proprietors and would-be child participants.

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

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400 See Starr & Li, supra note 15, at 7.
401 See supra Parts I, II.
402 See supra Part IV(B)(1).
403 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.
404 Cf. GURSTEIN, supra note 32, at 5-6 (explaining that right to free expression should not trump principled discussion about “our common world”).
405 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.
406 Nor would it violate parents’ rights to free expression. The proposed statute would regulate children’s conduct not parents. 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’ right. See, e.g., Hall v. Wooten, 506 F.2d 564, 566 (6th Cir. 1974) (citing cases supporting proposition that “one may not sue for the deprivation of another’s civil rights,” including that “father, not acting in his representative capacity, had no standing to sue for the deprivation of the civil rights of his child”).
Reality programming is not immune from regulation simply because it is a form of expression.\(^{407}\) It “has no special immunity from the application of general laws.”\(^{408}\) Its proprietors must answer for libel, pay taxes, and suffer punishment for contempt of court like everyone else.\(^{409}\) Where a regulation is a neutral labor law that does not interfere with expression qua expression, it will be upheld.\(^{410}\) 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.\(^{411}\)

*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.\(^{412}\) In that case, cable representatives challenged a law that taxed cable but exempted other media.\(^{413}\) 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.\(^{414}\) The Court disagreed explaining that differential treatment of speakers is “constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints”\(^{415}\) or where it discriminates on speech content.\(^{416}\)

The primary inquiry to determine whether a regulation discriminates on content is whether the government adopted it to regulate the message expressed.\(^{417}\) “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.”\(^{418}\) 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.”\(^{419}\)

\(^{407}\) *Cf.* Associated Press v. N.L.R.B., 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 Commissioner 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).

\(^{408}\) *Cf.* Associated Press, 301 U.S. at 132-33.

\(^{409}\) *Cf. id.* at 133.


\(^{411}\) See *Walling*, 327 U.S. at 193; *cf. also* N.L.R.B., 301 U.S. at 130-31 (holding NLRA does not violate First Amendment).


\(^{413}\) *Id.* at 442-43.

\(^{414}\) *Id.* at 442.

\(^{415}\) *Id.* at 447.

\(^{416}\) *Id.*


\(^{418}\) *Id.* at 643.

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

A statute regulating the use 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.

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 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. The statute thus regulates the manner of speech but

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420 *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”).

421 *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.

422 *Id.* at 448-49.

423 *Id.* at 447-48.


425 That this may incidentally burden expression by preventing one entertainment format for communicating messages does not invalidate the regulation. *Cf.* Rendon v. Transp. Security 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.”).
not the speech itself. Neutral regulation of the time, place, and manner of speech is constitutionally permissible.\textsuperscript{426}

A federal statute regulating employment of children in reality programming is content-neutral. The Court subjects content-neutral regulation to “intermediate scrutiny,”\textsuperscript{427} 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.\textsuperscript{428} This standard “affords the Government latitude in designing a regulatory solution.”\textsuperscript{429} To satisfy it, “a regulation need not be the least speech-restrictive means of advancing the Government’s interests.”\textsuperscript{430} A law is sufficiently narrowly tailored where it promotes an important government interest that would be accomplished less effectively without the regulation.\textsuperscript{431} Regulations are not invalid simply because there exists an alternative that is less burdensome on speech.\textsuperscript{432} It suffices that Congress has determined that the means chosen add to the effectiveness of accomplishing its goal.\textsuperscript{433}

\textsuperscript{426} Young v. Am. Mini Theatre, Inc., 427 U.S. 50, 63 n.18 (“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.”).

\textsuperscript{427} Contra Turner Broad. Sys., Inc., 512 U.S. at 642 (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”); NOWAK & ROTUNDA, 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).


Commercial speech also receives intermediate scrutiny. See \textit{Cent. Hudson Gas & Electric Corp. v. Public Servs. Comm’n}, 447 U.S. 557 (1980) (Blackmun, 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. \textit{See id.} at 561 (emphasis added); \textit{see also} ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: Substance and Procedure § 20.26 (4th ed. 2007)). Thus, it is not commercial speech. \textit{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”); \textit{cf. also} Joseph 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 \textit{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.” \textit{Id.} at 501.

\textsuperscript{429} Turner II, 520 U.S. at 213.

\textsuperscript{430} \textit{Turner Broadcasting Sys., Inc.}, 512 U.S. at 642.


\textsuperscript{432} \textit{See Rumsfeld}, 547 U.S. at 67; Turner II, 520 U.S. at 217-18.

\textsuperscript{433} \textit{See Rumsfeld}, 547 U.S. at 67; \textit{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 \textit{United States v. Albertini}, 472 U.S. 675, 689 (1985))).
The proposed statute serves an important government interest: Congress’s commerce authority to regulate employment. This interest is unrelated to any expressive message, which may still be communicated through other expressive outlets and entertainment formats. The statute prohibits one means of expressing the message but not the message itself. 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.

Congress should narrowly tailor such a statute to ensure that the sliding-scale of prohibition prohibits no more speech than necessary to protect children as appropriate 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

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435 Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 60 (2006) (finding 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 laws schools’ conduct not speech (what they must do not 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 547 U.S. at 62. Congress may prohibit discrimination in employment, and the fact that this may compel employers to remove signs stating “White Applicants Only” does not transform the regulation from one of conduct to speech. Id. at 62.

436 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, author books, to name a few. The only thing they may not do is express this message by using children in reality programming. Cf. City of Erie, 529 U.S. at 293-94.

437 Cf. id. at 294-96 (applying secondary effects analysis to determine whether speech is content neutral).
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this scale should be sufficiently narrowly tailored. \(^438\) This judgment is appropriately left to Congress. \(^439\)

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’s primary objective is supported with findings showing that the need for legislation is independent of the message conveyed, the Court will uphold such legislation. \(^440\) 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 willing child participants. First, the law does not regulate the 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, \(^441\) 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 as to the children as well.

To the extent that such a regulation incidentally infringes on 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.” \(^442\) Children are vulnerable and lack

\(^{438}\) Cf. Frisby v. Shultz, 487 U.S. 474, 485-86 (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).

\(^{439}\) Cf. Rumsfeld, 547 U.S. at 67; Turner II, 520 U.S. at 193-96 (discussing importance of deference owed to Congress).


\(^{441}\) Depending on her age, she may only have capacity to assist in this.

\(^{442}\) Prince v. Mass, 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 (Spring 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
maturity to make informed critical decisions, which justify not equating children’s rights with those of adults.\textsuperscript{443} The state has a strong interest in the wellbeing of its youth, and this justifies reasonable regulation aimed at them.\textsuperscript{444}

Children are not without rights, however.\textsuperscript{445} 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 school house gate.”\textsuperscript{446} They are persons under the Constitution, and they have fundamental rights that the government must respect.\textsuperscript{447} The government may not “arbitrarily” deny children freedom of expression.\textsuperscript{448}

In determining the scope of children’s rights, the Court considers the purpose behind the rights.\textsuperscript{449} The First Amendment’s purpose is to guaranty the liberty of expression to preserve a “free trade in ideas.”\textsuperscript{450} The First Amendment grants more than just freedom to say, write, or publish what one wants.\textsuperscript{451} It grants each person the liberty to decide to what she will expose herself.\textsuperscript{452} “The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.”\textsuperscript{453}

The Court has held that the government may determine that children lack that capacity, and thus, it may prevent them from choosing from the marketplace of ideas where important decisions with potentially serious consequences are concerned.\textsuperscript{454} “These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, and morals of its community by barring the distribution to children of books recognized to be suitable for adults.\textsuperscript{455}

\textit{Ginsberg}, 390 U.S. at 636 (internal quotations and modification omitted).

\textsuperscript{443} See \textit{Bellotti} v. Baird, 443 U.S. 622, 634 (1979). For a thoughtful book maintaining that because of this vulnerability the First Amendment should apply less stringently to children than adults, see KEVIN W. SAUNDERS, \textit{SAVING OUR CHILDREN FROM THE FIRST AMENDMENT} (N.Y. Univ. Press 2003).

\textsuperscript{444} See \textit{Bellotti}, 443 U.S. at 640-41.

\textsuperscript{445} See id. at 633 (stating that children are not beyond the protection of the Constitution, which is not for adults alone).


\textsuperscript{447} Id. at 511.

\textsuperscript{448} See \textit{Bellotti}, 443 U.S. at 637 n.15. The Court upheld the First Amendment rights of the students in \textit{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.” \textit{Id.} (citing \textit{Tinker}, 393 U.S. at 510).

\textsuperscript{449} See \textit{Ginsberg}, 390 U.S. at 649 (Stewart, J., concurring).

\textsuperscript{450} \textit{Id.} (internal quotations omitted).

\textsuperscript{451} \textit{Id.}

\textsuperscript{452} \textit{Id.}

\textsuperscript{453} \textit{Id.; see also Bellotti}, 443 U.S. at 636 (noting that First Amendment right involves right to make choices).

\textsuperscript{454} See \textit{Ginsberg}, 390 U.S. at 649 (Stewart, J., concurring); \textit{Bellotti} v. Baird, 443 U.S. 622, 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. \textit{See Ginsberg}, 390 U.S. at 650.
minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Because of this, despite the importance the Court has always placed on the First Amendment, it has permitted the government to control the conduct of children more than adults even where it invades protected freedoms. 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.”

The proposed statute is such a law. It aims to regulate minors’ behavior because of their lesser 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 from participating.

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.” One important value undergirding the First Amendment is the importance of a “marketplace of ideas.” The idea behind this is that truth will ultimately emerge if all competing ideas have freedom for expression. Thus, the remedy for “bad speech” is more speech not censorship. “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. “Children are in the process of development. Influences that might be minor for adults can have a seriously negative impact on children.”

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. “[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.” Children are “too young to see the long-term picture and to weigh the potential

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455 Bellotti, 443 U.S. at 635.
456 Bellotti, 443 U.S. at 636.
457 See id. at 637 n.15.
458 See supra Part II.
459 Saunders supra note 443, at 3.
460 Id. at 4; see also id. at 29-30.
461 See id. at 29-30.
462 Id. at 30.
463 Id. at 30-31.
464 Id. at 3.
465 See NPR, supra note 83; Sheridan, supra note 83, at 32 (querying whether an eight year-old child can really provide informed consent to participate in reality programming).
466 NPR, supra note 83. “[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 168, at 1271 (internal quotations omitted).
impact on their psyche, reputation, and opportunities. 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. “These qualities often result in impetuous and ill-considered actions and decisions.” Supporting this conclusion is research showing that “adolescents are overrepresented statistically in virtually every category of reckless behavior.”

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 memorialized for all time. 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.” And the creation of a child’s public persona often comes at the cost of her private personality. 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, this is necessary given the secondary effects associated with such participation and the inability of children to give informed consent to accept such consequences.

CONCLUSION

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

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467 Reality TV is Child Abuse, supra note 73.
469 Id. (internal quotations omitted).
470 Id.
471 Lowry, supra note 77, at Television 13.
472 Reality TV is Child Abuse, supra note 73.
473 See supra Part II.
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.