

**The Kids Are Not Alright:  
An Open Call for Reforming the Protections  
Afforded to Reality Television's Child Participants**

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*"I love acting. It is so much more real than life."* - Oscar Wilde

*"Today, [reality television] shows make up more than forty percent of TV programming."*<sup>1</sup>

*"I would say [...] 70 to 80 percent of the [reality television] shows on TV are (bull)."*<sup>2</sup>

## Introduction

There is no denying that reality television is here to stay. A driving force for most networks, it has been estimated that reality television accounts for at least forty percent of all television programming.<sup>3</sup> Shows such as A&E's *Storage Wars*<sup>4</sup> and the History Channel's *Swamp People*,<sup>5</sup> have adults as primary cast members who are better able than children to understand the consequences of appearing on television. This makes the rigorous travel schedule of the *Storage Wars* cast and the condescending feel of the title *Swamp People*, easier to rationalize in comparison to shows subjecting children to rigorous travel schedules and unfair stereotypes consequences. Unfortunately, a troubling trend emerging among reality television programming is the use of children as primary cast members. Although the most ideal solution to the problem of child participation in reality television might be banning the practice entirely, such a solution is the most impractical of all available solutions. As reality television continues to gain popularity among audiences, as networks continue to compete for advertising dollars, and as reality television hopefuls continue to respond to casting calls, it seems nearly impossible to prohibit producers from utilizing the talents of the younger generations. Banning children from participating in reality television is unreasonable and unrealistic. Consequently, it is clear that appropriate restrictions

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<sup>1</sup> Jessica Barton, *The Reality of Reality Television*, TOMMIE MEDIA (Nov. 14, 2011, 9:59 PM), <http://www.tommiedia.com/opinions/the-reality-of-reality-television/>.

<sup>2</sup> Ree Hines, *'Bachelor' Creator Claims '70 to 80 Percent' of Reality TV is Fake*, THE CLICKER ON TODAY (Jun. 15, 2012, 11:59 AM), [http://theclicker.today.com/\\_news/2012/06/15/12240003-bachelor-creator-claims-70-to-80-percent-of-reality-tv-is-fake?lite](http://theclicker.today.com/_news/2012/06/15/12240003-bachelor-creator-claims-70-to-80-percent-of-reality-tv-is-fake?lite).

<sup>3</sup> Barton, *supra* note 1.

<sup>4</sup> This show focuses on adults who attend auctions at storage facilities to bid on units that have fallen into foreclosure. This show is comparable to *Dance Moms* due to its competitive nature and weekly travel from location to location. See *About the Show, STORAGE WARS*, <http://www.aetv.com/storage-wars/about/> (last visited Nov. 26, 2012).

<sup>5</sup> *Swamp People* is a show set "deep in the heart of Louisiana," and follows a group of people referred to as "Cajuns," or "swampers," during the 30 day alligator hunting season. This show is comparable to TLC's *Honey Boo Boo*, because both take place in the rural south, follow people with unique lifestyles, and has somewhat condescending undertones. See *About Swamp People*, HISTORY, <http://www.history.com/shows/swamp-people/articles/about-swamp-people> (last visited Nov. 26, 2012).

regarding the scope of participating in reality television must be enacted to protect the children's best interests.

This article analyzes two popular albeit highly controversial television shows, Lifetime's *Dance Moms*, and TLC's *Here Comes Honey Boo Boo*, and calls for a federal standard regulating the participation and treatment of children on reality television.<sup>6</sup> It argues that these children are performers and must be afforded protections akin to those afforded to children who participate in more traditional entertainment media.<sup>7</sup> Sections II and III provide background on the two shows used for analysis. Section II describes Lifetime's *Dance Moms*, and Section III describes TLC's *Here Comes Honey Boo Boo*, (hereinafter, *Honey Boo Boo*). Section IV, which is divided into five subsections, analyzes the protections currently in place for child performers on federal and state levels. First, Section IV(a) examines the "Shirley Temple" exception for child performers under the Fair Labor Standards Act. Section IV then applies the existing child performer state level protections of three states to *Dance Moms* and *Honey Boo Boo*. Section IV(b) discusses and applies California's child performer state level protections. Section IV(c) analyzes and applies New York's child performer state level protections. Section IV(d) examines and applies New Mexico's child performer protections, which were amended in 2007. Section IV(e) presents and applies the child labor laws of Pennsylvania and Georgia where *Dance Moms* and *Honey Boo Boo* are filmed. Section V suggests the creation and adoption of a federal statute regulating minors' participation in the entertainment industry, specifically targeting children in reality television.

### I. An Introduction to Lifetime's *Dance Moms*

On a normal basis, the world of competitive dance is grueling. Former competitive dancer Samantha Pflum<sup>8</sup> danced from age two

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<sup>6</sup> For convenience and clarity, the term "reality children" refers to children who participate on reality television shows.

<sup>7</sup> For convenience and clarity, the term "traditional entertainment media" refers to situations where children are actors on television shows (e.g. sitcoms, dramas, etc.).

<sup>8</sup> Samantha R. Pflum is currently studying for her Ph.D. in Psychology at the Palo Alto University in Palo Alto, California. She was a competitive dancer at Starmaker School of the Performing Arts in Flemington, NJ and Broadway Bound Dance Center ("Broadway Bound") in Lebanon, NJ from age two until age eighteen. Accepted to both Starmaker and Broadway Bound's company programs, Ms. Pflum competed at many dance competitions attended by the *Dance Mom*'s cast during her tenure as a competitive dancer. Ms. Pflum was the president of a non-competitive troupe during her time studying at Johns Hopkins University and still takes an occasional dance class. Telephone Interview with Samantha R. Pflum (Oct. 16, 2012).

through age eighteen, joining a company dance program<sup>9</sup> at the young age of six. Ms. Pflum describes her dance experience as a “wonderful part of [her] youth,”<sup>10</sup> that afforded her the opportunity to “meet lifelong friends and learn a great deal about [herself].”<sup>11</sup> Ms. Pflum also credits her dance experience with helping her learn “how to handle pressure and cope effectively with stress.”<sup>12</sup> She was “fortunate enough to have dedicated and compassionate instructors who, while they pushed [her and her teammates] hard, understood that dance [was not their] only priority. It was certainly a major [priority], but [they] were also involved in other activities – [they] went to school, to rehearsal, did homework, took exams, and spent time with friends and family.”<sup>13</sup> Unlike the *Dance Moms* cast, Ms. Pflum’s company rehearsed for “about 10 hours per week, with additional rehearsals during weeks leading up to competitions,” and “start[ed to] learn [...] dances in August or September, working on them until [their] first competition in March or April.”

In comparison, the cast of *Dance Moms* attends at least twelve dance class hours per week plus four and a half extra hours of rehearsal time per week, for a grand total of at least sixteen and a half hours spent at the studio per week.<sup>14</sup> Ms. Pflum and her company participated in three competitions per year and rounded out their season with a two-day recital in June.<sup>15</sup> The cast of *Dance Moms*, on the other hand, enters different dances into a different competition each episode, totaling thirteen competitions during season one<sup>16</sup> and twenty-six during season two.<sup>17</sup> The

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<sup>9</sup> A company dance program is an audition or invite only group of students selected to perform at competitions and special performances in the local community. Ms. Pflum was a member of Broadway Bound’s company, The Force, for eight years. According to Broadway Bound’s website, members of The Force range in age from 6-18 years. These students form five groups of dancers and train a minimum of 5-10 hours a week in addition to many extra hours required to rehearse for upcoming performances and competitions. Members of The Force perform in only three Regional Dance Competitions, contrasted with one dance competition a week for the cast of *Dance Moms*. *The Force Dance Company*, BROADWAY BOUND DANCE CENTER, <http://bbdcnj.com/force.htm> (last visited Nov. 26, 2012).

<sup>10</sup> Telephone Interview with Samantha R. Pflum, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> This statistic describes the number of hours required by Abby Lee Miller’s pre-professional dance program participants. The girls on *Dance Moms* started out as members of this company, and rehearsed accordingly, prior to joining the television show. *Pre-Professional Program*, ABBY LEE DANCE COMPANY, <http://abbyleedance.com/rdp/preprofessional.htm> (last visited Nov. 26, 2012).

<sup>15</sup> Telephone Interview with Samantha R. Pflum, *supra* note 8.

<sup>16</sup> *Dance Moms Episode Guide Season One*, LIFETIME, <http://www.mylifetime.com/>

members of Abby Lee Miller's<sup>18</sup> pre-professional program, from which the girls were selected, compete in only three to six competitions by comparison.<sup>19</sup>

Ms. Pflum's mother, Marilyn Leo, spent much of the time Ms. Pflum was in rehearsals with other dance moms. Ms. Leo describes the dance moms of Ms. Pflum's peers as "composed of a variety of personalities. There were those like [her]self who were there to support [the] dancers to do their best, but most of all to have fun [...]. [There were] a few [stereotypical] dance moms who were only interested in the performances of their own children and would be rude and disruptive while others were performing [...]. Of course, some dancers were better than others, but a dance company is a team, and most dancers and moms [worked to] support the entire team."<sup>20</sup> Despite the rigorous rehearsal and practice schedules, long hours spent in the studio, and trips to and from dance competitions, Ms. Pflum and Ms. Leo only experienced the world of competitive dance on an extracurricular level. Ms. Leo's philosophy for her daughter was always for Ms. Pflum to "endeavor to be the best that she could be, but that when it stops being fun,"<sup>21</sup> it is time to move on. In agreement with Ms. Pflum, Ms. Leo felt that the instructors at Broadway Dance Center were mentors "who were always there to provide guidance and support when their dancers had personal problems or just needed to talk to someone [...]. On the opposite side of the spectrum, Abby Lee Miller's philosophy seems to be 'get platinum or get out!'"<sup>22</sup>

*Dance Moms* follows the experiences of studio owner, company founder, and dance instructor, Abby Lee Miller, her young competition

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shows/dance-moms/episodes/season-1 (last visited Nov. 26, 2012).

<sup>17</sup> *Dance Moms Episode Guide Season Two*, LIFETIME, <http://www.mylifetime.com/shows/dance-moms/episodes/season-2> (last visited Nov. 26, 2012).

<sup>18</sup> *Dance Moms* is a reality television show about to enter its third season. Set in Pittsburgh, PA at Abby Lee Dance Company, a studio owned and operated by Abby Lee Miller, the show's "outspoken," dance instructor. Lifetime's website describes the show as one: "Centered on the devoted Miller, who instructs her young, talented students, while also dealing with dedicated mothers who go to great lengths to help their children's dreams come true." The website goes on to say that "*Dance Moms* uniquely captures the dynamic interplay among teacher, student and parent as Miller commits herself to bring out the best in her students—and their mothers—willing to dedicate themselves to be part of one of the best dance teams in the nation." *About Dance Moms*, DANCE MOMS, <http://www.mylifetime.com/shows/dance-moms/about> (last visited Nov. 26, 2012).

<sup>19</sup> *Pre-Professional Program*, ABBY LEE DANCE COMPANY, *supra* note 14.

<sup>20</sup> Telephone Interview with Marilyn Leo (Nov. 19, 2012).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

troupe<sup>23</sup> (“the girls”), and the troupe’s mothers (“the mothers”). Each weekly episode features Ms. Miller ranking the girls based on the previous week’s performance<sup>24</sup> as well as practicing new routines. Each episode culminates with the girls competing the newly learned routines<sup>25</sup> in different cities across the United States.<sup>26</sup> Fights and arguments among the mothers involving everything from disputes over the treatment of the girls by Ms. Miller to the mothers’ personal lives are peppered through each half hour episode.

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<sup>23</sup> The show’s cast features a dance troupe made up of girls ranging in age from seven to thirteen and documents the relationships among the girls, their mothers, and their dance instructor. Maddie, age eight, and Mackenzie, age seven, are Melissa’s children. *About Melissa, Maddie and Mackenzie*, DANCE MOMS, <http://www.mylifetime.com/shows/dance-moms/cast/melissa-maddie-mackenzie>, (last visited Nov. 26, 2012). Chloe, age ten, is Christi’s daughter. *About Christi and Chloe*, DANCE MOMS, <http://www.mylifetime.com/shows/dance-moms/cast/christi-and-chloe> (last visited Nov. 26, 2012). Brooke, age thirteen, and Paige, age ten, are Kelly’s (herself, a former Abby Lee Dance Company dancer) daughters. *About Kelly, Brooke and Paige*, DANCE MOMS, <http://www.mylifetime.com/shows/dance-moms/cast/kelly-brooke-and-paige> (last visited Nov. 26, 2012). Nia, age nine, is Holly’s daughter. *About Holly and Nia*, DANCE MOMS, <http://www.mylifetime.com/shows/dance-moms/cast/holly-and-nia> (last visited Nov. 26, 2012). The show also features Kendall, age 9, Jill’s daughter. KENDALL VERTES, <http://kendallvertes.com/> (last visited Nov. 26, 2012). The show depicts Jill as a “studio hopper,” who has made the move back and forth from Ms. Miller’s studio to rival studio Candy Apples Dance Center, (“Candy Apples”) located in Canton, Ohio. CANDY APPLES DANCE CENTER, <http://www.candyapplesdance.com/> (last visited Nov. 26, 2012). Candy Apples dance center is owned and operated by dance instructor, Cathy, who, along with daughter Vivi-Anne, age 6.5, are both *Dance Moms* cast members. *About Cathy and Vivi-Anne*, DANCE MOMS, <http://www.mylifetime.com/shows/dance-moms/cast/cathy-and-vivi-anne> (last visited Nov. 26, 2012).

<sup>24</sup> Rich Juzwiak, *Dance Moms’ Abby Lee Miller On Ranking Students and Dressing them Sexily*, TV GUIDE (Jul. 21, 2011 3:54 PM), <http://www.tvguide.com/News/Dance-Moms-Abby-Miller-1035511.aspx>; Jackie Kass, *Top 10 Things to Know about Abby Lee Miller From ‘Dance Moms,’* THE EXAMINER (Feb. 22, 2012), <http://www.examiner.com/article/top-10-things-to-know-about-abby-lee-miller-from-dance-moms>.

<sup>25</sup> While most competition dance companies use the same few routines at each competition (According to Ms. Pflum, her studio, and most others, practiced between three to four group routines and one to two solo or small group routines per student, learned them throughout the year, and competed these repeatedly at different competitions, Telephone Interview with Samantha Pflum, *supra* note 8. Abby Lee Miller’s girls learn new routines each week.

<sup>26</sup> The competitions attended were not attended by Ms. Miller or her company prior to the filming *Dance Moms*. Juzwiak, *supra* note 24.

## II. An Introduction to TLC's *Here Comes Honey Boo Boo*

*Honey Boo Boo* is a reality television show spin-off from TLC's other reality show, *Toddlers and Tiaras*.<sup>27</sup> *Honey Boo Boo* takes place in rural Georgia and follows pageant hopeful and former *Toddlers and Tiaras* participant, Alana, otherwise known as *Honey Boo Boo*, and her family. TLC's website describes the show as one that takes viewers "from family outings to loud and crazy family get-togethers, [...] off the stage and into the outrageous family life of the Honey Boo Boo Clan."<sup>28</sup> The show glamorizes the idea of being a "redneck,"<sup>29</sup> a term with a negative connotation for southerners and the working class, by frequently showing Alana and her family yelling "you better redneck-onize,"<sup>30</sup> and attending an event called the "Summer Redneck Games."<sup>31</sup> The show's opening credits show June, Alana's mother, suffering from a case of flatulence and laughing about it.<sup>32</sup>

## III. Existing Federal and State Protections for Child Performers

Presently, the only protection pertaining to child labor at the federal level is the Fair Labor Standards Act ("FLSA"), which expressly

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<sup>27</sup> These two television shows are not the only reality television shows on TLC. In fact, every show currently airing on the network is a reality show of various formats. For a complete listing of programming on TLC see *TV Shows*, TLC, <http://tlc.discovery.com/tv/tv-shows.html> (last visited Nov. 26, 2012).

<sup>28</sup> As the title suggests, the show mainly focuses on the life of seven year old Alana (Honey Boo Boo). Other cast members include Alana's mother, June (Mama), Alana's father Mike (Sugar Bear), and Alana's half-sisters Lauryn (Pumpkin, age 12), Jessica (Chubbs, 15 years old), and Anna (Chickadee, 17 years old). *Here Comes Honey Boo Boo! Back For More*, TLC, <http://tlc.howstuffworks.com/tv/here-comes-honey-boo-boo/about-here-comes-honey-boo-boo.htm> (last visited Nov. 26, 2012). Anna recently gave birth to her first child, Kaitlyn, whose birth was captured on the season finale of *Honey Boo Boo*. Jenna Mullins, *Here Comes Honey Boo Boo Season Finale Recap: Glitzy Returns and Baby Kaitlyn Arrives*, EONLINE (Sep. 26, 2012 8:23 PM), <http://www.eonline.com/news/349221/here-comes-honey-boo-boo-season-finale-recap-glitzy-returns-and-baby-kaitlyn-arrives>.

<sup>29</sup> Webster's defines the term "redneck" as "a poor, white, rural Southerner, often, specific; one regarded as ignorant, bigoted, violent, etc." *Redneck* Definition, WEBSTER'S NEW WORLD DICTIONARY (3d college ed. 1994).

<sup>30</sup> Tom Gliatto, *Here Comes Honey Boo Boo: Five Life Lessons*, PEOPLE (Aug. 15, 2012 12:45 PM), <http://www.people.com/people/article/0,,20621188,00.html>.

<sup>31</sup> The "Summer Redneck Games," are an annual event held in East Dublin, Georgia, where *Honey Boo Boo*, takes place. The games include a bobbing for pigs' feet contest, a mud pit belly flop, and an armpit serenade among their events. See SUMMER RED NECK GAMES, <http://summerredneckgames.com/> (last visited Nov. 26, 2012).

<sup>32</sup> Gliatto, *supra* note 30.

exempts children employed in the performing arts.<sup>33</sup> Consequently, states are left to draft laws determining the level of protection they wish to afford to child performers. As this protection and the types of performers covered (i.e. reality children versus those participating in traditional entertainment media) vary greatly from state to state, producers are enticed to forum shop and produce their shows in states with minimal protections for children.<sup>34</sup> A federal standard is the best solution to this problem of reality children being unable to reap the benefits of protection under existing state child labor laws.

A. *The Fair Labor Standards Act and the “Shirley Temple Exception”*

The current and primary federal statute pertaining to the regulation of labor laws in the employment of children is the Fair Labor Standards Act.<sup>35</sup> The FLSA sets forth standards regulating minimum wage<sup>36</sup> and maximum hours,<sup>37</sup> in addition to other issues pertaining to fair labor regulations. Most relevant for reality children, the FLSA regulates the standards for employing minors.<sup>38</sup> The statute bans the employment of children under age sixteen and generally prohibits employment in any occupation deemed detrimental to the health or well-being of any person under age eighteen.<sup>39</sup> Unfortunately for child performers, the FLSA expressly exempts children entertainers from its protection.<sup>40</sup> This exception, commonly referred to as the Shirley Temple Exception,<sup>41</sup> does

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<sup>33</sup> Fair Labor Standards Act, 29 U.S.C. § 213(c) (1938).

<sup>34</sup> This is what occurred with *Kid Nation*, as producers found a state with lenient child labor laws in terms of performers, and were able to film a show that would not have been permissible in other states with stringent child labor laws. James Hibberd, *The Founding of Kid Nation; How CBS Navigated Legal, PR, and Logistical Shoals to Produce Key Show*, TV WEEK, [http://www.tvweek.com/news/2007/07/the\\_founding\\_of\\_kid\\_nation.php](http://www.tvweek.com/news/2007/07/the_founding_of_kid_nation.php) (last visited April 11, 2013).

<sup>35</sup> Ramon Ramirez, *What Will It Take?: In the Wake of the Outrageous “Balloon Boy” Hoax, A Call to Regulate the Long-Ignored Issue of Parental Exploitation of Children*, 20 S. CAL. INTERDISC. L.J., 617, 620 (2011) (discussing the FLSA in terms of child labor).

<sup>36</sup> 29 U.S.C. §206.

<sup>37</sup> 29 U.S.C. §207.

<sup>38</sup> 29 U.S.C. §212.

<sup>39</sup> Christopher C. Cianci, *Entertainment or Exploitation?: Reality Television and the Inadequate protection of Child Participants Under the Law*, 18 S. CAL. INTERDISC. L.J., 363, 375 (2009) (discussing the exemption for child performers under the FLSA).

<sup>40</sup> 29 U.S.C §213(c).

<sup>41</sup> 29 U.S.C. §213(c) earned this nickname because at the time the Act was adopted, Shirley Temple was at the height of her popularity, and Congress did not want to make it illegal to employ her in the performing arts. Kimberlianne Podlas, *Does Exploiting a*

not prohibit the employment of a minor if that child “is employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”<sup>42</sup>

Due to this exception from federal labor laws for child performers, states are left to draft their own statutes for regulating the treatment, protection, and experiences of child performers.<sup>43</sup> States such as California and New York, where child participation in the performing arts is commonplace, have adopted comprehensive regulatory schemes to afford protections to these children.<sup>44</sup> Unfortunately, the majority of states have little to no protection afforded to child performers at all.<sup>45</sup> Due to the flexible nature of reality television, a genre which has been deemed “Hollywood’s sweatshop,”<sup>46</sup> producers can literally take the show on the road, forum shop, and film where the labor laws are in the favor of production companies. They can essentially escape jurisdictions such as California and New York, where the labor laws are more protective of child performers.<sup>47</sup> In fact, a state’s interest in revenue may greatly outweigh its interest in protecting its children, leading producers in states with relatively lax labor laws to boast about the laws (or lack thereof) as an attempt to attract production to their state.<sup>48</sup>

“Only a handful of states have sought to specifically address issues facing these [reality] children [...] with comprehensive independent statutes.”<sup>49</sup> Furthermore, it is relatively unclear in the states that actually *do* have protections in place for children whether these laws apply to reality children.<sup>50</sup> Fortunately, state law has started evolving to afford protections to child performers who perform in the traditional

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*Child Amount to Employing a Child? The FLSA’s Child Labor Provisions and Children on Reality Television*, 17 U.C.L.A. ENT. L. REV. 39, 58 (2010) (discussing the FLSA’s Shirley Temple exception).

<sup>42</sup> 29 U.S.C. §213(c)(3).

<sup>43</sup> Cianci, *supra* note 39.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Edward Wyatt, *TV Contestants: Tired, Tipsy, and Pushed to the Brink*, N.Y. TIMES (Aug. 1, 2009), [http://www.nytimes.com/2009/08/02/business/media/02reality.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/08/02/business/media/02reality.html?pagewanted=all&_r=0).

<sup>47</sup> Ramirez, *supra* note 35 (discussing how producers move among states to take advantage of loopholes in child labor laws).

<sup>48</sup> Cianci, *supra* note 39.

<sup>49</sup> *Id.* at 381 (discussing the lack of state level protection for child entertainers).

<sup>50</sup> Cianci, *supra* note 39, at 382 (discussing states with protections in place for child entertainers).

entertainment media.<sup>51</sup> While these protections have made great improvements to the treatment of children involved in the traditional entertainment media, state regulation is grossly inadequate for the protection of reality children. This problem continues expanding as reality television programs featuring children become more and more prevalent each season.<sup>52</sup>

As the popularity of reality televisions shows featuring children grows, it becomes increasingly obvious that the need for regulation at the federal level is the most viable solution to this problem. Reliance solely on state laws does not work to adequately serve the best interests of reality children because the laws of many states are incredibly lax, and clever producers exploit the loopholes in states with inadequate protections for child entertainers<sup>53</sup> There are laws in a handful of states that may serve as a helpful model for drafting a federal statute. California and New York, due in large part to the concentration of the entertainment industry in those two states, have existing state law that can be helpful starting points for drafting a federal statute aimed at protecting child entertainers. New Mexico, in the wake of CBS's travesty, *Kid Nation*, redrafted its labor laws, putting stringent laws in place regulating the use of children performers. Although it may intuitively seem that reality children are part of the entertainment industry, it is not statutorily clear whether such children fall within the parameters of protection.

Producers and child advocates frequently clash over whether reality participants are working as employees. Production companies often argue that a reality participant, minor or adult, is not an employee of the company. Despite the presence of a camera crew, light crew, and other dedicated support staff, production companies maintain that the participant is simply conducting his or her daily routine.<sup>54</sup> This description allows the production companies to evade application of the labor laws.<sup>55</sup> Problematically, this common evasion results in nebulous state laws in terms of their application to reality television.

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<sup>51</sup> Katherine Neifeld, *More than a Minor Inconvenience: The Case for Heightened Protection for Children Appearing on Reality Television*, 32 HASTINGS COMM. & ENT. L.J. 447, 448 (2010) (discussing the disparity between protections for children involved in traditional entertainment media and reality children).

<sup>52</sup> Ramirez, *supra* note 35 (discussing trends in reality television).

<sup>53</sup> Adam P. Greenberg, *Reality's Kids: Are Children Who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act?*, 82 S. CAL. L. REV. 595, 598 (2009) (discussing child entertainers' reliance on state law for protections).

<sup>54</sup> Cianci, *supra* note 39, at 382 (discussing states with protections in place for child entertainers).

<sup>55</sup> *Id.*

For all intents and purposes, children appearing on reality television shows are working. Many reality television producers try to avoid complying with the labor laws with respect to the people participating on the show by arguing that these people are not working.<sup>56</sup> However, the Supreme Court has interpreted the term “working” broadly.<sup>57</sup> Under the Supreme Court’s interpretation, a person can be working even if he or she is simply sitting idly, waiting for instruction from his or her employer.<sup>58</sup> David Gurley, California’s Labor Commissioner, has stated that the control that reality television show directors and producers have is “enough to create an employer/employee relationship.”<sup>59</sup>

If the girls from *Dance Moms* are paid as *dancers*, it is very possible that they would be prohibited from competing at the very competitions the show features because in order to compete in most of these competitions a dancer cannot be considered “professional.”<sup>60</sup> However, according to Maryann Christopher,<sup>61</sup> if the girls were compensated for their participation in *Dance Moms*, they would be paid as reality television personalities and not as dancers.<sup>62</sup> “It is not like they are performing on Broadway or in a [professional] ballet company. What they are doing [for the show] is not primarily dancing.”<sup>63</sup> According to Ms.

<sup>56</sup> For example, the *Kid Nation* producers classified the set as a “summer camp,” rather than a place of employment to evade labor laws. See Hibberd, *supra* note 34.

<sup>57</sup> “The definition of ‘employ’ is broad.” Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947).

<sup>58</sup> See generally *Armour & Co. v. Wantock*, 323 U.S. 126 (1944).

<sup>59</sup> Letter from David Gurley to the Department of Labor Standards Enforcement, Legal Division (Feb. 25, 2003) available at [www.minorcon.org/standards.rtf](http://www.minorcon.org/standards.rtf).

<sup>60</sup> A “professional” dancer is one who is paid to dance. It is highly possible if the *Dance Moms* girls were paid for their dancing on the television show, they would be considered professional, and barred from competing in the amateur categories. According to Maryann Christopher, some competitions have a “professional amateur” category for professional dancers in which the girls could compete if they were compensated as dancers. According to Ms. Christopher, many dancers are also employed as compensated actors, models, etc. and still compete in the amateur categories. In Ms. Christopher’s opinion, if the girls were paid to be on the show, they would be paid as reality television personalities, and not as dancers and could still compete in the amateur categories. Telephone interview with Maryann Christopher, Owner, Miss Mare’s All About Dance (Oct. 17, 2012).

<sup>61</sup> Ms. Christopher is the owner of Miss Mare’s All About Dance in West Long Branch, NJ. She is also the owner of Rhythms in Dance, Dance Competition based in West Long Branch, NJ. Ms. Christopher has been in the professional and competition dance world for over 25 years as a competitor, teacher, dance coach, and competition judge. Her competition does not permit the *Dance Moms* cast to compete. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Christopher, “there are plenty of kids who are paid as models, actors, etc., who perform in competitions, [and] may be considered a professional [in that industry] but are not necessarily [...] professional dancer[s].”<sup>64</sup> The girls on *Dance Moms*, “are not [hired] for the dancing they are doing, [but rather] for the environment they are in.”<sup>65</sup> Although Ms. Christopher tends to avoid competing in shows where the *Dance Moms* cast is filming,<sup>66</sup> “as a competition director, if [the girls] were getting paid, it would not phase [her as a competition director or dance instructor] because [*Dance Moms*] is not a dance show, it is a reality show.” It is likely that not paying the girls is no more than a clever ploy by producers to avoid having the girls classified as employees, thus avoiding the child labor laws.

Although state laws are a step in the right direction when protecting child entertainers, they clearly do not do enough. As such, it is imperative to treat reality children as employees of the production companies for which they film a show and to afford them federal statutory protection.

#### B. *California Laws for Child Entertainers*

Unsurprisingly, California has the most stringent laws regulating child participation in the entertainment industry,<sup>67</sup> and will be most helpful in providing a guideline for a federal standard. California’s Labor Code specifically limits the amount of hours that a minor employed in the entertainment industry is permitted to work.<sup>68</sup> A child who is a citizen of California may not work more than eight hours in a twenty-four hour period or more than forty eight hours in one week.<sup>69</sup> Furthermore, a child residing in California and employed in the traditional entertainment media may not work before the hours of 5:00AM or after 10:00PM on any day preceding a school day.<sup>70</sup> California law further limits the employment of infants between the ages of fifteen days and one month in the

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Ms. Christopher says this is not because she does not like the dancers, but rather because it causes many logistical and time consuming obstacles at the competitions. For example, Ms. Christopher said that at each competition where the *Dance Moms* film, the production company must obtain a release form from every single dancer competing. To her, the added stress of filing out releases and dealing with camera crews makes competing alongside the *Dance Moms* cast not worth it. *Id.*

<sup>67</sup> Cianci, *supra* note 39, at 376 (discussing states’ interest in revenue outweighing concern for child entertainers).

<sup>68</sup> CAL. LABOR CODE §1308.7(a) (West 1993).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

entertainment industry, imposing a complete ban on infants younger than fifteen days of age.<sup>71</sup> The statute imposes fines for anyone who violated, directly or indirectly, any portion of the statute.<sup>72</sup>

California does provide some relief to production companies wishing to hire minors under age eighteen. Before securing employment in the entertainment industry, a minor in California must have or obtain a valid work permit.<sup>73</sup> In addition to obtaining a work permit, a minor under age sixteen must also have written permission from the California Labor Commission.<sup>74</sup> This permission is granted to the minor only if the California Labor Commission determines that the work environment is proper and that the work to be performed does not pose any harmful threats to the minor's health or well-being.<sup>75</sup> In addition, the work to be performed must not be of the type that will hamper the child's education.<sup>76</sup> As such, if the minor has not graduated high school, he or she must be provided with continuous education and taught at least three hours each day by a studio teacher (on days when school would normally be in session).<sup>77</sup> Once the child has obtained a valid work permit and (if under age sixteen) the California Labor Commission has granted its consent, the child may commence employment in the entertainment industry.<sup>78</sup> Even if permission is granted and the production company legally employs the child, other conditions set forth by the California Labor Code still apply. A parent or guardian of the minor child must be present on the set, within the sight and sound of the minor, at all times.<sup>79</sup> California law applies exclusively to minors who are residents of California,<sup>80</sup> which may

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<sup>71</sup> According to the statute, an infant employed in the entertainment industry in California, must be at least 15 days old, carried to full term, of a normal birth weight, and physically capable of handling the stress of filmmaking. The statute requires that a licensed physician and board-certified surgeon provide written certification to the previous specifications. The physician and surgeon must also provide written certification that the infant's lungs, eyes, heart, and immune system are developed sufficiently to withstand the potential risks associated with work in the entertainment industry before said infant will be permitted to work. LABOR §1308.7(a).

<sup>72</sup> LABOR §1308.7(c).

<sup>73</sup> Cianci, *supra* note 39, at 376 (discussing California's requirement for a child entertainer to obtain a work permit).

<sup>74</sup> *Id.* at 377 (discussing California's requirements for obtaining a work permit).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 378 (discussing California's education requirements for child entertainers).

<sup>78</sup> *Id.* (discussing California's requirements for obtaining a work permit).

<sup>79</sup> *Id.* at 377 (discussing California's requirement that a parent or guardian accompany a child entertainer on set at all times).

<sup>80</sup> *Id.* at 379 (discussing the applicability of California's labor law to California residents).

provide incentive for production companies to hire and produce outside California's jurisdiction.

David L. Gurley, the attorney for the Labor Commissioner in California, clarified the scope of California's labor laws as they pertain to reality children in a letter to the Department of Labor Standards Enforcement.<sup>81</sup> He specifically stated in this letter that the minimum standards of California's Labor Code "are strictly enforced as expressed, whether or not the format [of the program to be produced] is 'reality' based."<sup>82</sup>

In addition to regulating the conditions under which a child entertainer works, California also regulates how a child entertainer's finances are to be handled. California's Family Code provides that a trustee must establish a Coogan Trust Account for "preserving for the benefit of the minor the portion of the minor's gross earnings" specified under other subsections of the Family Code.<sup>83</sup> This section allows the minor, upon reaching majority, to access the funds in the trust.<sup>84</sup> Provisions like this are now common in states that have protections in place for child performers, but California was the first to implement this type of financial protection. These laws were drafted in response to the tragic story of Jackie Coogan, a child performer during the silent film era. Coogan experienced great success early on in his life, performing with Charlie Chaplin and eventually becoming one of the highest paid actors in Hollywood.<sup>85</sup> Despite being such a high earner, reportedly earning an income of over four million dollars during the span of his career, his mother and stepfather spent nearly all of his earnings.<sup>86</sup> Unfortunately for Coogan, his parents' excessive spending was completely legal under California law at the time, and he was not entitled to any of his earnings.<sup>87</sup> When Coogan sued for the return of his earnings, he only successfully recouped \$126,000.<sup>88</sup> The Coogan Laws specifically protect a child

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<sup>81</sup> See Letter from David Gurley to the Department of Labor Standards Enforcement, *supra* note 59.

<sup>82</sup> *Id.*

<sup>83</sup> CAL. FAM. CODE §6753(a) (West 1999).

<sup>84</sup> *Id.*

<sup>85</sup> THE INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0001067/bio> (last visited Nov. 26, 2012).

<sup>86</sup> See Saira Din, *Chapter 667: Instituting Proper Trust Funds and Safeguarding the Earnings of Child Performers from Dissipation by Parents, Guardians and Trustees*, 35 McGeorge L. Rev. 473 (2004) (discussing the Coogan Laws).

<sup>87</sup> *Id.*

<sup>88</sup> THE INTERNET MOVIE DATABASE, *supra* note 85.

entertainer's earnings, and do not regulate the manner in which the child works.

### 1. An Analysis of "Dance Moms" Under California Law

As clarified by the Labor Commissioner, California's labor laws apply to reality children as a class.<sup>89</sup> Therefore, at first glance it appears that the California labor laws apply to the girls of *Dance Moms*. Problematically, California's labor laws only apply to minors who are residents of California.<sup>90</sup> Each member of the *Dance Moms* cast is a resident of Pennsylvania,<sup>91</sup> thus removing the *Dance Moms* girls from the reach of California's labor laws.<sup>92</sup>

Assuming that California's labor laws did apply to the girls of *Dance Moms*, each girl must have obtained a valid work permit prior to joining the cast. In order to successfully obtain the work permit, the California Labor Commission would have had to find that the work environment is proper, that the work does not pose harmful threats to the

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<sup>89</sup> See Letter from David Gurley to the Department of Labor Standards Enforcement, *supra* note 59.

<sup>90</sup> Cianci, *supra* note 39, at 379 (discussing the applicability of California's labor law to California residents).

<sup>91</sup> A reality TV show that aired on TLC, *Jon and Kate Plus 8* (later just *Kate Plus 8*) brought Pennsylvania's child labor laws to the forefront of American discourse. These laws are discussed in greater detail in Part E(i), *infra*. For more information on *Kate Plus 8* see *Kate Plus 8*, TLC, <http://tlc.howstuffworks.com/tv/kate-plus-8> (last visited Nov. 26, 2012).

<sup>92</sup> According to Brooke's website, she attends Franklin Regional High School in Murrysville, PA. Therefore, she must be a Pennsylvania resident. *Brooke Hyland Dancer on Lifetime's Dance Moms*, LIFETIME, <http://brookehyland.com/> (last visited Nov. 26, 2012). According to Paige Hyland's website, she attends Franklin Regional Middle School and lives in Murrysville, PA, and therefore must be a Pennsylvania resident. *Paige Hyland Dancer on Lifetime's Dance Moms*, LIFETIME, <http://paigehyland.com/> (last visited Nov. 26, 2012). According to her webpage, Chloe Lukasiak lives in Churchill, Pennsylvania. *Chloe Lukasiak Lifetime's Dance Moms Dancer*, LIFETIME, <http://chloelukasiak.net/> (last visited Nov. 26, 2012). According to her webpage, Maddie Ziegler lives in Murrysville, PA. *Maddie Ziegler Dancer on Lifetime's Dance Moms*, LIFETIME, <http://maddieziegler.com/> (last visited Nov. 26, 2012). According to her webpage, Mackenzie Ziegler attends Sloan Elementary School, located in Murrysville, PA, and therefore must be a Pennsylvania resident. *Maddie Ziegler Dance on Lifetime's "Dance Moms*, LIFETIME," <http://mackenzieziegler.net/> (last visited Nov. 26, 2012). Nia Frazier's school and hometown are not listed on her website. *Nia Frazier Dancer on Lifetime's Dance Moms*, LIFETIME, <http://niafrazier.com/> (last visited Nov. 26, 2012). However, her mother formerly worked at the Winchester Thurston School, located in Pittsburgh, PA, and it is safe to assume that Nia is a Pennsylvania resident. WINCHESTER THURSTON SCHOOL OUR CITY CAMPUS, <http://www.winchesterthurston.org/page.cfm?p=605> (last visited Nov. 26, 2012).

children's health or well-being, and that the work will not harm the children's education. It is very likely that the permit would be granted, at least for film production in Pittsburgh,<sup>93</sup> provided that the Labor Commissioner found the dance studio safe and the work safe for the children to perform.

Should California labor laws apply to *Dance Moms*, Lifetime would need to ensure that its child performers obtained proper work permits and that the show then complied with the rest of the statute pertaining to child labor (including any Coogan requirements). The girls would be fully protected by the child labor laws. Nevertheless, because the girls are not California residents, the laws do not apply.

## 2. An Analysis of "Honey Boo Boo" Under California Law

Again, because the laws of California only work to protect California residents and because Alana of *Honey Boo Boo* is not a California resident, the child labor laws will not apply to her. Assuming that the laws did apply, TLC would need to obtain valid work permits for Alana, and the show would need to comply with the labor laws for child entertainers. However, because the laws only apply to California residents, the California laws would do nothing to afford protection to Alana.

### *C. New York Law for Child Entertainers*

The laws in New York pertaining to child performers are modeled after those in California.<sup>94</sup> However, unlike California, where the Labor Commissioner explicitly stated that the laws apply to reality children as well as those employed in traditional entertainment media, it is unclear the extent to which New York's laws apply to reality children.<sup>95</sup> Similar to California, New York has regulations that extend beyond Coogan style financial protection for minors employed in the entertainment industry.<sup>96</sup> In New York, it is "unlawful [...] to employ, or to exhibit, or to cause to

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<sup>93</sup> Each episode, Ms. Miller, the girls, moms, and other cast members, travel to dance competitions in various states (including Pennsylvania, New York, and California), however the dance studio is based in Pittsburgh, PA. Although probable, it remains unclear whether work permits would have to be obtained to film in each state during travel/while on location at these various competitions. This question is beyond the scope of this paper.

<sup>94</sup> Dayna B. Royal, *Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming*, 43 *Akron L. Rev.* 435, 461 (2010) (discussing New York's child entertainer labor laws).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

be exhibited [...] any child under the age of sixteen [...] whether or not such child or any other person is being compensated for the use of such child,” in a list of enumerated activities.<sup>97</sup> This provision gives with one hand and takes away with the other, because in the very next section, the statute explicitly states that it does not apply to “the participation or employment, use, or exhibition of any child in a[n...] academy or school, including a dancing or dramatic school, as part of regular services or activities thereof respectively; [...] or in a private home.”<sup>98</sup> Although the statute requires the issuance of a work permit for any child performer in New York,<sup>99</sup> the loophole in the preceding section seems to exempt most reality television programs, and definitely exempts the two at issue in this article.

### 1. An Analysis of “Dance Moms” Under New York Law

With *Dance Moms* taking place in a dance school and the minor cast members participating in the “regular activities” of the studio, there is a possibility that the New York statute, as written, would not protect these children. However, in a TV Guide interview, Ms. Miller suggests that the activities portrayed each week are not the norm for her students.<sup>100</sup> When asked about the controversial pyramid ranking<sup>101</sup> on *Dance Moms*, Ms. Miller responded “I’ve never done that in my life. That has nothing to do with me. [That is] the show. They came up with that whole process.”<sup>102</sup> The interview continues to discuss aspects of the show that are not part of Ms. Miller’s own method, particularly teaching a student a new routine each week. Ms. Miller responded “teaching children a routine in a hotel hallway that they are performing onstage the next day? [That is] insane. Nobody would do that.”<sup>103</sup> However, learning routines in an incredibly short amount of time (often a day or less) is a frequent occurrence on the show. Ms. Miller states in the interview that the dance competitions featured on the show and attended by her troupe are ones she has “never

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<sup>97</sup> These activities include, but are not limited to, the following: “singing; or dancing; or playing upon a musical instrument; or acting; or rehearsing for; or performing in a theatrical performance or appearing in a pageant; [...] or in connection with the making of a motion picture.” MCKINNEY’S ARTS AND CULTURAL AFF. LAW §35.01(1)(a) (2004).

<sup>98</sup> MCKINNEY’S §35.01.

<sup>99</sup> MCKINNEY’S §35.01(3).

<sup>100</sup> Juzwiak, *supra* note 24.

<sup>101</sup> Each episode, the show begins with “pyramid,” a brief time before dance class begins, where Ms. Miller ranks her students from best (top of the pyramid) to worst (bottom of the pyramid).

<sup>102</sup> Juzwiak, *supra* note 24.

<sup>103</sup> *Id.*

attended in [her] life.”<sup>104</sup> Taking into consideration the fact that, according to Ms. Miller, many of the practices that are portrayed as commonplace on the show are in fact creations of Lifetime, there is a strong argument that the children are not engaging in the “regular activities”<sup>105</sup> of this particular dance studio. In that case, the statutory exception would not apply, and the girls may be afforded protection.

## 2. *An Analysis of “Honey Boo Boo” Under New York Law*

The enumerated list of exceptions to the child labor laws as they pertain to entertainers in New York works to the disadvantage of the *Honey Boo Boo* cast similar to how it disadvantages the girls on *Dance Moms*. This enumerated list specifically states that it does not apply to “the participation or employment, use, or exhibition of any child [...] in a private home.” The majority of filming for *Honey Boo Boo* takes place in Alana’s home. As such, the private home exemption will keep the child labor laws from applying to most of the footage for *Honey Boo Boo*. The labor laws might still apply when filming is done outside the home.<sup>106</sup> Nonetheless, it is unlikely that the laws would apply because it is unclear whether New York’s protections extend to reality children. Therefore, assuming that reality children are not covered by New York’s child labor laws, the laws do not apply to Alana and her sisters – regardless of whether the filming takes place inside the family home or outside in public.

### *D. New Mexico Law for Child Entertainers*

Imagine forty kids, between the ages of eight and fifteen, living in a ghost town with no parents, no modern comforts, and prohibited from returning home for over a month.<sup>107</sup> These children, left to their own devices in an abandoned town, are tasked with cooking meals, cleaning outhouses, learning to run businesses, and developing a “real” government.<sup>108</sup> The government is comprised of four “kid leaders” responsible for guiding the other participating children by passing laws

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<sup>104</sup> *Id.*

<sup>105</sup> MCKINNEY’S §35.01(2).

<sup>106</sup> Some episodes feature Alana preparing for her pageants, and the cameras follow her and her family as they do errands in hometown to take pageant lessons (as on the episode *Ah-choo!*), have costumes fitted (as on the episode *I’m Sassified!*), shop for wigs (as on the episode *Shh! It’s a Wig*), etc. See MSN ENTERTAINMENT, <http://tv.msn.com/tv/series-episodes/here-comes-honey-boo-boo/> (last visited Nov. 26, 2012).

<sup>107</sup> Hibberd, *supra* note 34.

<sup>108</sup> Maria Elena Fernandez, *Is Child Exploitation Legal in ‘Kid Nation’?* L.A. TIMES (August 17, 2007), <http://articles.latimes.com/2007/aug/17/entertainment/et-kidnation17>.

(including setting bedtimes).<sup>109</sup> This description is not a book report describing *Lord of the Flies*,<sup>110</sup> but rather a plot summary for CBS's controversial reality show *Kid Nation*, which premiered in September 2007.<sup>111</sup>

*Kid Nation* was filmed in Bonanza City, New Mexico.<sup>112</sup> Prior to filming of the show, New Mexico had not yet amended its child labor laws for children in entertainment.<sup>113</sup> On the show, the children were split into four groups who competed against each other every three days in mental or physical challenges.<sup>114</sup> Before being permitted to participate in the show, the parents (or legal guardians) and the children were required to sign a twenty-two page participating agreement.<sup>115</sup> This agreement stated that the parent was agreeing to "give up certain legal rights on behalf of [himself] and the Minor [sic]."<sup>116</sup> Under the agreement, children were required to do whatever the producers instructed them to do, twenty-four hours a day, seven days a week, or risk being expelled from the show.<sup>117</sup> The agreement also bound parents and children to strict confidentiality standards, imposing a five million dollar penalty for any violation of the

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<sup>109</sup> *Id.*

<sup>110</sup> WILLIAM GOLDING. *LORD OF THE FLIES* (Faber and Faber 1954).

<sup>111</sup> TELEVISION BLEND, <http://www.cinemablend.com/television/TV-Recap-Kid-Nation-Premiere-6437.html> (last visited Nov. 26, 2012).

<sup>112</sup> *Bonanza City* is actually the Bonanza Creek Movie Ranch, a "privately owned town setting," that has been used as a set for movies including *SILVERADO*, and *ALL THE PRETTY HORSES*. Hibberd, *supra* note 34.

<sup>113</sup> In July 2007, New Mexico amended its child labor act to bring the laws closer to those in place in California. Cianci, *supra* note 39, at 380 (discussing New Mexico's amended child labor laws); *See also* N.M. STAT. ANN. §50-6 (West 1978) for amended laws.

<sup>114</sup> Cianci, *supra* note 39, at 367 (discussing the structure of *Kid Nation*).

<sup>115</sup> *Id.* at 368 (discussing the structure of *Kid Nation*).

<sup>116</sup> By signing the agreement, the parents were essentially waiving any right to sue CBS or the producers of the show on any claims related to the filming of the show (before, during or after production) in any way whatsoever. Page one, *Kid Nation Contract see No Rights in "Kid Nation," No Liability for CBS in Controversial 'Ghost Town' Reality Series*, *The Smoking Gun* (Aug. 23, 2007), <http://www.thesmokinggun.com/file/no-human-rights-kid-nation>; For example, the agreement required parents to acknowledge that "the Program may take place in inherently dangerous travel areas that may expose the Minor [...] to a variety of unmarked and uncontrolled hazards and conditions that may cause the minor serious bodily injury, illness, or death, including without limitation: general exposure to extremes of heat and cold; [...] drowning; treacherous terrain; [...] encounters with wild animals [...], loss of orientation (getting lost) in primitive areas, exhaustion, dehydration, fatigue, over-exertion and sun or heat stroke." *Id.* The agreement also required parents to "waive any privacy rights," because the "the Minor's actions and conversations during the course of participat[ion ...] will be observable by and audible to others and that the Minor will have no privacy." *Id.*

<sup>117</sup> *Id.*

confidentiality agreements.<sup>118</sup> Lastly, the participation agreement explicitly stated that any stipends do not “in any way whatsoever, [constitute] a wage, salary, or other indicia of employment.”<sup>119</sup>

Arguing that the involvement in the show was analogous to attending summer camp,<sup>120</sup> producers were able to film the child participants from as early as 7:00AM until midnight, for seven days a week, during a forty-day span.<sup>121</sup> Their ability to impose such a rigorous filming schedule on the children was due, in no small part, to the lenient labor laws in place in New Mexico at the time.<sup>122</sup> New Mexico has since amended its labor laws. Although the change in New Mexico’s labor laws was not motivated by the events that took place during the filming of *Kid Nation*, the new laws have prevented CBS from shooting a second season in Bonanza City.<sup>123</sup>

New Mexico’s amended child labor laws entirely forbid the employment of any child under age fourteen.<sup>124</sup> The law also prohibits the employment of any minor between the ages of fourteen and sixteen unless that child has obtained a valid work permit.<sup>125</sup> If the minor obtains a valid work permit, the law establishes maximum work hours and times, limiting the hours per day and week depending on whether school is in session.<sup>126</sup> However, New Mexico’s labor law contains an exception to the work permit, age, and time, restrictions provided the child is “employed [...] as an actor or performer in a motion picture, theatrical, radio or television production [...].”<sup>127</sup> Defining “performer” broadly,<sup>128</sup> the statute considers any performer under eighteen years of age a child, unless such performer “has satisfied the compulsory education laws of the state, [...] is married, [...] is a member of the armed forces, [...] or is emancipated.”<sup>129</sup> Setting forth rigorous limitations on the time a child may work<sup>130</sup> and the number

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Hibberd, *supra* note 34.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> N.M. STAT. ANN. §50-6-1.

<sup>125</sup> N.M. STAT. ANN. §50-6-2.

<sup>126</sup> N.M. STAT. ANN. §50-6-3.

<sup>127</sup> N.M. STAT. ANN. §50-6-17(A)(2).

<sup>128</sup> N.M. STAT. ANN. §50-6-18(A) states: “a ‘performer’ means a person employed to act or otherwise participate in the performing arts, including motion picture, theatrical, radio or television products.”

<sup>129</sup> N.M. STAT. ANN. §50-6-18(B)(1)-(4).

<sup>130</sup> N.M. STAT. ANN. §50-6-18(C).

of hours a child may work,<sup>131</sup> these laws would seem to prevent continuous and around the clock filming of children, such as that which occurred during the initial filming of *Kid Nation*.<sup>132</sup>

It is unclear whether New Mexico's laws apply to reality children as a class. It seems more likely than not that the laws would apply to reality children in shows comparable in format to *Kid Nation*. The reality children of *Kid Nation* are analogous to children participating in traditional entertainment media because they are subject to direction, asked to repeat lines, and required to recreate scenarios.<sup>133</sup> Therefore, these children are closer to behaving as performers rather than experiencing life as it happens to them, the main characteristic of reality television. Conversely, when applying the laws to shows filmed in the format of *Dance Moms* or *Honey Boo Boo*, it seems much less likely that New Mexico's laws would afford protection to the reality children because the format of these shows requires the children to live life as usual despite the presence of a camera.

### 1. An Analysis of "Dance Moms" Under New Mexico Law

To be a "performer" in New Mexico, the statute simply requires that the "person [be] employed to act or otherwise participate in the performing arts, including motion picture, theatrical, radio, or television products."<sup>134</sup> There is still uncertainty about whether New Mexico's laws

<sup>131</sup> N.M. STAT. ANN. §50-6-18(D) (1978).

<sup>132</sup> New Mexico also has laws in place establishing Coogan-style trust accounts for child performers. These laws almost mirror California's, requiring that fifteen percent of the child's gross earnings are deposited into a trust account available to the child upon reaching the age of majority. Interestingly, this provision only applies to contracts for equal to or greater than \$1,000. See N.M. STAT. ANN. §50-6-19.

<sup>133</sup> See Maria Elena Fernandez, 'Kid Nation' Parents Speak Out, Though Bound By a Confidentiality Pact, They Tell Advocacy Groups of Concerns that Children were Fed Lines, LOS ANGELES TIMES (August 31, 2007), <http://articles.latimes.com/2007/aug/31/entertainment/et-kidnation31>. *Kid Nation* kids were subject to direction, asked to repeat lines and reenact scenarios, and brought to a location commonly used as a movie set to film the show. This level of direction means the show could possibly be considered "scripted," removing it from the realm of reality television programming. That analysis is beyond the scope of this paper, however it lends support to the notion that many reality children are, in fact, working. Hibberd, *supra* note 34.

<sup>134</sup> N.M. STAT. ANN. §50-6-18(A). The issue, then, would become whether the girls are actually "employed." The US Code defines employee if "under the usual common law rules applicable in determining the employer-employee relationship, [one] has the status of an employee." 26 U.S.C. § 3121(d) (1954). The common law rules state that an employer/employee "relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and

apply to reality children performers. The broad definition of performer seems to suggest that all people employed in the performing arts are covered and that reality children are also afforded protection. Such a conclusion would mean that the girls of *Dance Moms* would also be categorized under the “performer” definition and be afforded protection under New Mexico’s child labor laws. Assuming that the statute does apply to reality children and that the girls are eligible for protection, the analysis then turns to whether Lifetime has complied with the specific restrictions pertaining to working hours and other conditions.

## 2. An Analysis of “Honey Boo Boo” Under New Mexico Law

Again, the broad definition of “performer” under New Mexico law is critical to this analysis. Although the issue of whether the definition includes reality children has yet to be definitively resolved, it is possible that the legislation was drafted expansively to be adaptable to new forms of entertainment. If this is the case and the laws do extend to reality children, Alana would need to be afforded full protection under the child entertainer provision of New Mexico law.

### *E. A Closer Look at the Child Labor Laws in the States Where “Dance Moms” and “Honey Boo Boo” Are Filmed*

While analysis considering how various state protections apply to reality children may be instructive in determining how to draft a federal statute, it is critical to discuss the protections actually afforded to the reality children of *Dance Moms* and *Honey Boo Boo*. Accordingly, this subsection analyzes how the child labor laws pertaining specifically to child entertainers apply in each show’s respective home state. Pennsylvania’s child labor laws are discussed with respect to their application to *Dance Moms*, and Georgia’s child labor laws are discussed with respect to their application to *Honey Boo Boo*.

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means by which that result is accomplished.” *United States v. Crawford Packing Co.*, 330 F.2d 194, 195 (5th Cir. 1964). There is no doubt that the girls on *Dance Moms* are subject to the control of Lifetime’s production company, at least to some degree. The girls are required to film testimonials, be in certain places at certain times, and engage in other aspects of filming a show that they would not be required to take part in otherwise. Therefore, the girls should be considered “employees” and be protected by the statute. Unfortunately, this is not usually the case with reality television as production companies classify the shows as documentaries and claim not to interfere with the natural situations experienced by cast members. The small fact that many reality television cast members are required to film testimonials directly contradicts the idea that the filming of a reality television show simply captures real life.

### 1. An Analysis of “Dance Moms” Under Pennsylvania Law

*Jon & Kate Plus 8* (*Jon & Kate*) was a reality show that aired on TLC from 2007-2011.<sup>135</sup> The show took place in southeastern Pennsylvania and followed Jon and Kate Gosselin and their eight children as they lived their daily lives.<sup>136</sup> The show brought attention to Pennsylvania’s child labor laws, raising concerns about whether TLC was complying with these laws during filming. An investigation took place in 2009.<sup>137</sup> Although at the time the show was filmed Pennsylvania had laws pertaining to child entertainers, the extent to which these laws applied to reality children was unclear.<sup>138</sup> Central to the debate concerning the Gosselin children was whether the Gosselins’ home was akin to a television set, “where producers direct much of the action,” or whether the children were not actually working but simply conducting normal routines as a camera recorded typical daily activity.<sup>139</sup>

Child labor laws in Pennsylvania prohibit the employment of any minor under age sixteen.<sup>140</sup> However, Pennsylvania does have a special provision relating to children employed in the entertainment industry.<sup>141</sup> This provision permits the employment of children ages seven to eighteen in “theatrical productions, musical recitals or concerts, entertainment acts, modeling, radio, television, motion picture making, or in other similar forms of media in Pennsylvania where the performance of such minor is not hazardous to his safety or well-being.”<sup>142</sup> The section provides limitations on the hours a minor may work (no later than 11:30PM<sup>143</sup>) and a limitation on the number of performances a minor may engage in (no more than two in a day or eight in a week).<sup>144</sup> Pennsylvania law permits rehearsals for performances “provided the length of time and hours of

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<sup>135</sup> The first five seasons were titled *Jon & Kate Plus 8*. Following Jon and Kate’s very public divorce, seasons six and seven aired as *Kate plus 8*, until the show was cancelled after filming 148 episodes. THE INTERNET MOVIE DATABASE, *supra* note 85.

<sup>136</sup> *Kate Plus 8*, *supra* note 94.

<sup>137</sup> Associated Press, ‘*Jon & Kate*’ Plus...*Child Labor Complaint*, NBC NEWS (May 29, 2009), <http://today.msnbc.msn.com/id/31001777/ns/today-entertainment/t/jon-kate-plus-child-labor-complaint>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> This law provides an exception for children between ages twelve and fourteen employed as golf caddies and children ages fourteen and sixteen as long as the work does not interfere with school attendance. 43 PA. STAT. ANN. §42 (West 1915).

<sup>141</sup> 43 PA. STAT. ANN. §48.1.

<sup>142</sup> *Id.*

<sup>143</sup> 43 PA. STAT. ANN. §48.1(a)(1).

<sup>144</sup> 43 PA. STAT. ANN. §48.1(a)(4).

starting and finishing such rehearsals added to performance duties are not such as to be injurious or harmful to the minor.”<sup>145</sup>

The Abby Lee Dance Company is located in Pittsburgh, Pennsylvania, four and a half hours from where *Jon & Kate* was filmed.<sup>146</sup> The majority of filming for *Dance Moms* takes place at this studio.<sup>147</sup> Pennsylvania’s laws pertaining to child labor do have an exception for employment in the performing arts.<sup>148</sup> It is unclear in Pennsylvania, as in most other states, whether these laws apply to reality children. Assuming that the laws do extend to reality children, the laws must afford protection to the cast of *Dance Moms*. The girls fall into the category of performing on a television show,<sup>149</sup> implicating the remaining sections of the statute that limit working hours and the number of performances a minor may engage in, as well as other regulations. Additionally, if the girls’ performances at the dance competitions fall into the “performance” section of the statute, then the time they spend rehearsing is also regulated. The law permits rehearsals for performances, provided that the time spent rehearsing is not “injurious or harmful to the minor.”<sup>150</sup> If it is clearly determined that Pennsylvania’s labor laws do, in fact, apply to reality children, the production of *Dance Moms*, must comply.

## 2. An Analysis of “Honey Boo Boo” Under Georgia Law

*Honey Boo Boo* is set in Georgia, a state with shockingly lax child labor laws for child entertainers, especially when compared with California, New York, New Mexico, and even Pennsylvania. In general, Georgia’s laws provide that no minor under twelve years may be employed at all,<sup>151</sup> and no minor under sixteen may be employed for more

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<sup>145</sup> 43 PA. STAT. ANN. §48.1(b).

<sup>146</sup> Driving Directions from Wyomissing, PA to the Abby Lee Dance Center, GOOGLE MAPS, <https://www.google.com/maps> (follow “Get Directions” hyperlink; then search “A” for “Wyomissing, PA” and search “B” for “7123 Saltsburg Road, Pittsburgh PA, 15235; then follow “Get Directions” hyperlink).

<sup>147</sup> The format of each episode of *Dance Moms* is as follows: during the first half of the show, the girls are recorded at the studio preparing for that week’s competition, the second quarter shows the girls traveling to and arriving at the competition, the final quarter shows the girls performing on stage and attending awards ceremonies for that week’s competition.

<sup>148</sup> 43 PA. STAT. ANN. §48.1.

<sup>149</sup> It is unlikely that their dance lessons will be considered performances for purposes of the statute as this is an extracurricular activity, therefore it is best for the children to consider them performers on a television show to guarantee that they are covered by the statute. *Id.*

<sup>150</sup> 43 PA. STAT. ANN. §48.1(b).

<sup>151</sup> GA .CODE. ANN. §39-2-9 (West 2012).

than four hours on a school day or more than eight on a non-school day.<sup>152</sup> A minor under sixteen may not work more than forty hours in any one week.<sup>153</sup> Georgia's child labor laws do not apply to a minor working in agriculture, domestic service in private homes, specific types of employment exempted by the labor laws, or employment by a parent or legal guardian.<sup>154</sup> It is specifically stated in the law that "nothing in [Georgia's labor laws] shall apply to any minor employed as an actor or performer in motion pictures or theatrical productions, in radio or television productions, [or] in any other performance, concert, or entertainment, [...] provided that the written consent of the Commissioner of Labor must be first obtained."<sup>155</sup> All that is needed for the Commissioner of Labor to give consent is that he investigate and determine "that the environment [...] is proper; [...] that the conditions of employment are not detrimental to [...] health; [...] that the minor's education will not be neglected or hampered by his participation [in the entertainment activities]; and that the minor will not be used for pornographic purposes."<sup>156</sup>

Whether Georgia's child labor laws include reality children is unclear. The language of the statute states that it covers "any minor employed as an actor or performer [...]"<sup>157</sup> Based on this language alone, it seems that a reality child may be protected because of the use of the term "any minor." In actuality, the statute only covers minors employed as an actor or performer. Consequently, the analysis must focus on whether the reality children are considered performers.<sup>158</sup> The statute does not explicitly define "performer." If the reality children are not determined to be performers, the statute will not apply to them. Assuming that the reality children are performers and the statute does extend to afford protections to reality children, the production of *Honey Boo Boo* must adhere to the regulations set forth governing child entertainers. In this situation, the Commissioner of Labor must merely give written consent for the child performer to take part in the performance.<sup>159</sup> In order to be granted

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<sup>152</sup> GA. CODE ANN. §39-2-7.

<sup>153</sup> *Id.*

<sup>154</sup> GA. CODE ANN. §39-2-9.

<sup>155</sup> GA. CODE ANN. §39-2-18(a).

<sup>156</sup> GA. CODE ANN. §39-2-18(b).

<sup>157</sup> GA. CODE ANN. §39-2-18(a).

<sup>158</sup> Because of the nature of "reality" television, it is highly unlikely that these children will be considered "actors," as they are not "acting" in the common sense of the word. Instead, they are rather portraying themselves as they would supposedly behave in the absence of a camera crew. *See infra* note 182.

<sup>159</sup> GA. CODE ANN. §39-2-18(b).

permission, the producer must prove that the environment is proper, the child will not be harmed, and the child will not be used for pornographic purposes.<sup>160</sup>

#### **IV. A Federal Statute for Affording Protection to Reality Children is the Best Solution**

The creation of a federal standard is the only solution that eliminates the ability for each state to regulate labor as it relates child entertainers.<sup>161</sup> In fact, it seems that the *Dance Moms* cast has much less hope for protection under child labor laws than does the cast of *Honey Boo Boo*. This outcome is nonsensical, as the need for children to be protected from dangerous and unfair labor conditions—especially the situations they experience as part of reality television casts – does not change depending on where they are in the country.

In terms of ratings and producer satisfaction, the more controversy surrounding a particular reality television show, the better.<sup>162</sup> Importantly, with a show spotlighting interesting sects of the American population,<sup>163</sup> viewers who may not have originally tuned in to watch the show will watch one or two episodes out of curiosity, begin talking about the show, and spread interest.<sup>164</sup> Unfortunately, many of these shows involve

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<sup>160</sup> *Id.*

<sup>161</sup> As the analysis above shows, when looking at just four states in terms of each example show, the application of child labor laws varies greatly. The *Dance Moms*, girls are only definitely covered by one out of four state's labor laws—California. But, because of California's restriction to application for California residents only, the *Dance Moms*, girls do not benefit from these laws anyway. It is unclear the extent to which the other states' laws apply to reality children, though it seems highly probable that the laws of New Mexico apply. This leaves the girls with barely any hope of protection from unfair labor conditions, as it only seems probable that the laws of one state apply. Only California's laws apply with certainty to the cast of *Honey Boo Boo*, but again considering California's residency requirement, the laws do not afford any protections to *Honey Boo Boo*. Only New Mexico's laws seem to definitely apply; however it is not 100% certain that these laws do extend to reality children. It appears that Georgia's laws will apply, however these laws are incredibly lax and do not offer exceptional protection from unfair labor conditions. *Honey Boo Boo*, however, has a much higher chance of reaping the benefits of the child labor law protections than does *Dance Moms*.

<sup>162</sup> Cianci, *supra* note 39, at 364-65, (discussing controversy on reality television).

<sup>163</sup> For example, *Dance Moms* focusing on incredibly talented young dancers, *Honey Boo Boo* featuring an overweight pageant hopeful from the south, *Breaking Amish* following Amish adolescents experiencing New York City for the first time, etc., the list is endless. See, e.g., *About Breaking Amish*, TLC, <http://tlc.howstuffworks.com/tv/breaking-amish> (last visited Nov. 27, 2012).

<sup>164</sup> Cianci, *supra* note 39, at 365 (discussing how producers generate buzz about reality television programming).

children<sup>165</sup> who are seemingly exploited by fame-hungry parents and money-hungry producers.

Reality television differs from traditional entertainment media in two critical aspects: preparation and portrayal.<sup>166</sup> The core of the issue is the portrayal. In a traditional entertainment medium, the participant is portraying a character.<sup>167</sup> If the participant did not want to portray this particular character, he or she would not have auditioned for or accepted the part. The participant and his or her audience know that it is merely a portrayal of a fictitious character.<sup>168</sup>

Conversely, reality television, at least in the non-competition format, aims to capture life as it happens—a definitionally un-rehearsable procedure.<sup>169</sup> This difference does not provide too much cause for concern because the reality participant, being an adult or child has signed up to be on a reality television show, the very premise of which is to portray the “daily life of real people.”<sup>170</sup> Therefore, reality children do not “learn lines nor don [...] costumes.”<sup>171</sup> Instead, hours and hours of footage are filmed and then edited down into episode—length segments, typically a half hour or an hour.<sup>172</sup> The editors take the footage and create a story based on what they have captured on film, as opposed to prewriting a story in script form and then capturing it on film, as in a traditional entertainment medium.<sup>173</sup> As such, the reality participant is unaware what footage will air or how it will be spliced together.<sup>174</sup> This often leads to distorted portrayal of reality television participants, which is problematic because the person portrayed on television is supposed to be an accurate

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<sup>165</sup> Tanya Ghahremani, *The 10 Most Uncomfortable Reality Shows About Kids*, COMPLEX POP CULTURE (August 24, 2011), <http://www.complex.com/pop-culture/2011/08/the-10-most-uncomfortable-reality-shows-about-kids>.

<sup>166</sup> Neifeld, *supra* note 51, at 450 (discussing preparation versus portrayal on reality television programs).

<sup>167</sup> *Id.*

<sup>168</sup> Or, in the case of a biography, for example, the actor and his audience know that it is an actor portraying a real person, through lines written in script.

<sup>169</sup> Neifeld, *supra* note 51, at 450 (discussing preparation versus portrayal on reality television programs).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> For example, on MTV’s first season of *The Real World*, cameras were rolling twenty four hours a day for a three month period, adding up to about 2,160 hours of footage. This was edited down to thirteen twenty two minute long episodes, totaling six and a half hours of total air time. Winifred Fordham Metz, *How Reality TV Works*, HOW STUFF WORKS (December 7, 2007), <http://electronics.howstuffworks.com/reality-tv4.htm>.

<sup>173</sup> Neifeld, *supra* note 51, at 451 (discussing the creation of reality television storylines).

<sup>174</sup> *Id.*

and “real” representation of the person in real life. Reality children must be protected from the harsh results of appearing on reality television shows.

Portrayal on television may have long lasting effects on children, especially because of the way the internet enables embarrassing scenes from reality television to live on into perpetuity.<sup>175</sup> Unlike children, adults are more likely able to fully comprehend the risks involved with being on a reality television show. Often, a child’s participation occurs once a parent or legal guardian agrees to the child’s participation on the child’s behalf.<sup>176</sup> These concerns do not change across state lines. As such, the regulation must parallel the regulations afforded to child participants in traditional entertainment media implemented on a federal level.

The time has come to repeal the FLSA’s Shirley Temple exception and redraft the FLSA to apply to child entertainers as a class. There are concerns that a total repeal of the Shirley Temple exception would be

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<sup>175</sup> For example, the Balloon Boy hoax involved Falcon Heene and his parents, who tricked America into believing Falcon had taken off in a balloon and flown away. In truth, young Falcon was hiding in the attic the entire time, and later revealed that the stunt had all been done “for the show,” during an interview with Larry King. *Authorities: ‘Balloon Boy’ Incident Was a Hoax*, CNN (October 19, 2009), <http://www.cnn.com/2009/US/10/18/colorado.balloon.investigation/index.html>. During subsequent interviews, Falcon became so emotional that he threw up on camera, a clip which is readily available on YouTube, three years after the incident took place. *Falcon Heene: Balloon Boy Vomits on Today Show*, YOUTUBE, <http://www.youtube.com/watch?v=buKA2bD9mM0> (last visited Nov. 27, 2012). Looking to the two shows used as examples here, Maddie Ziegler, who is portrayed on the show as Ms. Miller’s favorite girl and a near perfect dancer, forgot her dance number on one of the episodes and subsequently has a nervous breakdown backstage. The clip of Maddie forgetting her steps is also readily available on YouTube. *Dance Moms Maddie Forgets Her Solo*, YOUTUBE, <http://www.youtube.com/watch?v=AryLVY6deqs> (last visited Nov. 27, 2012). Maddie, who aspires to be a professional dancer one day, may have to face this clip haunting her for years to come, calling into question her competency to remember choreography and her ability to handle stress. *Maddie Ziegler Dancer on Lifetime’s Dance Moms*, *supra* note 92. *Honey Boo Boo* has numerous potentially embarrassing videos on YouTube, including a video of Alana making her belly talk. *Belly Talking Honey Boo Boo Child*, YOUTUBE, <http://www.youtube.com/watch?v=xFxHym1vXFU> (last visited Nov. 27, 2012). The portrayal of the family without any manners may come back to haunt Alana in the future, especially as she continues her career in the world of pageants.

<sup>176</sup> The common law infancy doctrine holds that contracts with minors are generally voidable, and allows minors to disaffirm contracts entered into on their behalf when they reach the age of majority. The policy rationale for the infancy doctrine is that minors are “easily exploitable and less capable of understanding the nature of legal obligations that come with a contract.” Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 50 (2012) (discussing, generally, the infancy doctrine).

simultaneously overbroad and under-inclusive.<sup>177</sup> A total repeal may be overbroad because it would result in all child performers being covered by the FLSA's coverage for labor in general.<sup>178</sup> Such a result is problematic because children participating in traditional entertainment media are not subject to the same harms and dangers that reality children are exposed to.<sup>179</sup> For example, child Broadway actors go to rehearsals, perform a limited number of shows a night, play a character that both the performer and the audience know is not the child himself or herself, and returns home at the end of the day. The same goes for a child involved in the creation of a traditional television show or movie—rehearsals, tapings, and most importantly the portrayal of a character all occur. Meanwhile, a reality child is frequently filmed in his own home or at a place familiar to the child (i.e. the girls on *Dance Moms*, are not filmed in their homes but are filmed at their dance studio, where they spend a significant amount of time outside of school, as well as constantly filmed as they travel to competitions), going about his or her daily routine, playing no character but himself or herself. It is argued that a complete repeal of the FLSA's exemption for child performers is also under-inclusive because a complete repeal still does not ensure that reality children will be afforded adequate protection.<sup>180</sup> Therefore, a repeal of the FLSA's Shirley Temple exception alone does not solve the problem<sup>181</sup>—instead, it must be repealed and then appropriately rewritten. A federal statute is the best solution. It should be drafted to apply to reality children and traditional child entertainers. This

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<sup>177</sup> Royal, *supra* note 94, at 475 (discussing a proposed statute aimed at affording protection to child entertainers).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Matt Savare questions whether repealing the Shirley Temple exception entirely and leaving child entertainers subject to labor laws in general might be the best solution. Telephone Interview with Matthew Savare (Nov. 28, 2012). When considering this proposed solution, it is important to remember the reason why the Shirley Temple exception was drafted to begin with—legislators realized that Shirley Temple “led box-office receipts” during the time when the law was being drafted and proposed. Jeffrey A. Tucker, *The Trouble with Child Labor Laws*, LUDWIG VON MISES INSTITUTE (February 11, 2008), <http://mises.org/daily/2858>. Contemplating the immense popularity of television shows (both reality and traditional) featuring children, it is clear that a complete repeal (which would entirely prohibit the employment of children below a certain age) is impractical for the same reasons the Shirley Temple exception was included in the labor laws to begin with. As such, the best solution is to repeal the Shirley Temple exception and replace it with a section regulating the participation of children in all entertainment media so that a compromise between child advocates and producers is reached.

statute should be narrowly tailored to afford appropriate protections to each class of child entertainers without being under—or over—inclusive.

Drawing inspiration from the state statutes such as those in California, New York, and New Mexico, the FLSA should first explicitly state that it covers not only entertainers participating in traditional entertainment media, but also reality children—no matter the format of the show in which they participate.<sup>182</sup> This will solve the problem of clarity with which many of the state statutes struggle. The federal statute must be as comprehensive as possible to avoid any problems with interpretation and application. Like the California, New York, and New Mexico statutes, the federal statute must provide a ban on employment of infants less than one month of age unless a physician and pediatric surgeon provide written certification that the infant is at least fifteen days old and healthy enough to handle the rigors of filming. This section can be modeled on California's specifications for the employment of infants under the age of one month in the entertainment industry.<sup>183</sup>

The statute should establish a general prohibition on the employment of any minor under age eighteen unless the production company procures a valid work permit for the minor from the Commissioner of Labor. This provision should be modeled after the New York statute's provision pertaining to the judicial approval of contracts for the services of minors, and the Georgia statute's provision regulating the employment of a minor as an actor or a performer.<sup>184</sup> This work permit should be valid for twelve month time periods and renewable once without

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<sup>182</sup> *Dance Moms* and *Honey Boo Boo* are examples of docu-soap reality television, where the camera is similar to a fly on the wall, and merely observes the day-to-day activity of the cast members. The story lines are developed by editors in the cutting room. TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/RealityTV> (last visited Nov. 27, 2012). Another type of reality programming is competition shows, such as *So You Think You Can Dance*, which involve cast members competing to win a prize. A spin-off show from *Dance Moms*, titled *Abby's Ultimate Dance Competition*, is incredibly similar to "So You Think You Can Dance," except it involves only children competing to win a scholarship to the Young Dancer Program at the Joffrey Ballet School. *About Abby's Ultimate Dance Competition*, LIFETIME, <http://www.mylifetime.com/shows/abbys-ultimate-dance-competition/about> (last visited Nov. 27, 2012). In light of the competition style shows with children contestants, the statute must be forward-thinking, and apply to reality children participating in all formats of reality shows.

<sup>183</sup> CAL. LABOR. CODE. §1308.8(A) (West 2012). Matthew Savare, Counsel at Lowenstein Sandler PC in Livingston, NJ, also points out that soon there may be issues of internet and mobile productions, downloadable as applications on smart phones, a forecast making it imperative for the statute to extend to all formats of reality shows. Telephone Interview with Matthew Savare, Counsel at Lowenstein Sandler PC (Nov. 28, 2012).

<sup>184</sup> MCKINNEY §35.03; GA. CODE ANN. §39-2-18.

re-inspection by the Commissioner of Labor for contracts that last longer than a twelve month period. If a child enters into a contract for less than a twelve-month period, the permit should expire when the contract expires. Should the child wish to re-sign a contract extending the time stipulated, he or she must acquire a new work permit.<sup>185</sup> A provision requiring a work permit is critical to the statute because it ensures that a regulator will periodically inspect working conditions for reality children and other child entertainers. As such, any infractions will be detected in a timely fashion and there will be greater incentive for production companies, which will be anticipating regular inspection, to comply with the laws.

The federal statute should also specify working hours for the minor. Following the guidelines set forth by the New Mexico statute, the federal statute should prohibit start times earlier than 5:00AM and end times later than 10:00PM on evenings preceding a school day, and 12:00AM on evenings preceding a non-school day. The statute should also include limitations on the number of hours that a child is permitted to work. Again, using New Mexico as a model, these hours should depend on the child's age. A child performer under the age of six should be limited to no more than six hours per day.<sup>186</sup> A child performer between ages six and nine should be limited to no more than eight hours per day.<sup>187</sup> A child performer between the ages nine and sixteen should be limited to nine hours per day, and a child performer between ages sixteen and eighteen should be limited to ten hours per day.<sup>188</sup> It is crucial to the effectiveness of the statute to define the hours that the minor may work because minors of varying ages can handle different amounts of working time. The statute should state that minors must be finished working by a certain time on days preceding a school day so that they are well-rested and can get the most out of their education. By explicitly defining the hours a minor is permitted to work, the statute will ensure that children work days are kept

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<sup>185</sup> The twelve month time periods and the renew period are for the convenience of child actors performing in traditional entertainment media. For example, children appearing on sitcoms may have contracts extending beyond a one-year period. As such, the renewal period will make it easier for this child to continue working seamlessly. However, if the child agrees only to a three month production period, as is common with many reality television programs, the child will be required to obtain a new permit if he enters into an additional contract for additional seasons. This will protect the reality child from enduring abusive labor conditions, because the workplace will frequently be under inspection by the Commissioner of Labor, while allowing a child in the traditional entertainment media to seamlessly continue performances.

<sup>186</sup> See N.M. STAT. ANN. §50-6-18(D) (1978).

<sup>187</sup> See *Id.*

<sup>188</sup> See *Id.*

to reasonable lengths and that children are not too exhausted from work to perform well in school.

The last section of the federal statute should include provisions pertaining to the education of a child performer. The statute must require that employers (production companies) provide tutors who hold state teaching credentials whenever their child performers work on school days. This requirement is modeled after the law in New Mexico.<sup>189</sup> The child must attend a minimum of 180 days total of school per year, regardless of whether that time consists exclusively of private tutoring, in-class instruction in a traditional school during non-filming days, or a combination of both. This requirement should not apply to minors who have already graduated from high school or attained a high school equivalency diploma. Delineating the specific requirements for an on-set tutor and/or education in a traditional classroom setting for child performers is critical to ensure the quality of education for the performer.

The proposed statute should read as follows:

### **Children Working in the Performing Arts**

- A. For purposes of this section, “performer,” means any minor less than eighteen years of age employed to act, or otherwise participate, in the performing arts, including motion picture, theatrical, radio, or television products, including, but not limited to reality television programming in any format.
- B. An infant performer less than one month old is banned from performing in any of the media mentioned in subsection (A) of this statute.
  - a. Exception: If the infant is less than one month old, but more than fifteen days old (i.e.: 16-30 days old), the infant may perform in any of the performance media mentioned in subsection (A) of this statute, provided that both a pediatric surgeon and physician have provided written certification accompanying the infant’s application for a work permit confirming that said infant is:
    - i. At least fifteen days old

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<sup>189</sup> See N.M. STAT. ANN. §50-6-18(E).

- ii. Healthy enough to handle the rigors of performance, meaning that the infant:
  1. was carried to full term
  2. was of normal birth weight when born
  3. is physically capable of handling the stress of filmmaking
  4. has lungs, eyes, a heart, and an immune system that are sufficiently developed to withstand the potential risks associated with performance in any of the performance media mentioned in subsection (A) of this statute.
- C. Any performer seeking employment in the entertainment industry must provide the production company with a valid work permit issued by the Commissioner of Labor.
  - a. If the child enters into a contract for a period exceeding twelve months:
    - i. This work permit is valid for a period up to, but not exceeding, twelve months
    - ii. This work permit is renewable up to one time without re-inspection by the Commissioner of Labor if the contract extends beyond twelve months
    - iii. Once the work permit has been renewed one time, the child must reapply for a work permit, which will issue only upon re-inspection by the Commissioner of Labor
      1. There is a 30-day grace period for reapplication in this situation
  - b. If the child enters into a contract for less than a twelve month period:
    - i. This work permit is valid for a period up to, but not exceeding, twelve months
    - ii. Should the child wish to extend his contract extending the time he will garner services for a period that exceeds a total of twelve months, he must provide a new work permit prior to continuing performance

- iii. Should the child wish to sign a new contract with a new production company, he must obtain a new work permit before commencing performance
- D. A child performer's working hours are limited as follows:
  - a. A child performer may not begin work any earlier than 5:00AM on any day (school day or non-school day)
  - b. A child performer may not finish work later than 10:00PM on a night preceding a school day
  - c. A child performer may not finish work later than 12:00AM on a morning of a non-school day
  - d. A child performer may not work longer on any given day than:
    - i. Six hours if the child is age six and under;
    - ii. Eight hours if the child is age seven, eight, or nine;
    - iii. Nine hours if the child is age ten, eleven, twelve, thirteen, fourteen, or fifteen;
    - iv. Ten hours if the child is age sixteen, seventeen, or eighteen.
- E. If a child performer is required to work on a school day:
  - a. A tutor with state certified teaching credentials must be provided to the child by the production company;
  - b. The child must attend a total of 180 days of school per year
    - i. This time may consist of private tutoring, in-class instruction in a traditional school during non-filming days, or a combination of both.
  - c. If the child performer has already graduated from high school or attained a high school equivalent degree, subsection (E) does not apply.

## Conclusion

Reality television is here to stay and more shows premiere every season that primarily focus on children. These children, susceptible to fame-hungry parents<sup>190</sup> and producers eager save money, are often subject to labor law violations due to loopholes in federal law exempting child performers from coverage and state laws providing unclear guidance on the application of their laws to reality television children. Repeal of the FLSA's Shirley Temple exception and replacing it with a comprehensive federal statute covering both reality children and those participating in traditional entertainment media is the only way to protect reality children from the dangers involved with participating in a reality television show.

As Nelson Mandela once said, "there can be no keener revelation of a society's soul than the way in which it treats its children."<sup>191</sup> We must treat our children with the utmost respect, protection, and value. While reality television programming may grant society at large a great opportunity to learn from children through observation of their innocent, yet amazingly insightful, comments and remarks,<sup>192</sup> we must ensure that we are protecting these children by providing them the same legal protections promised to all child laborers.

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<sup>190</sup> For example, Marquis Walker (the "Youtube Baby") was subject to his father's marketing campaign to make Marquis a basketball sensation. This aggressive marketing campaign utilized basketball superstars such as LeBron James and Kevin Durant was designed by Walker's father Chikosi Walker to "achieve basketball greatness." Another example of parents exploiting their children to seek fame is Balloon Boy, where Falcon Heene's parents had him hide in the attic while they convinced the media that he had escaped in a dangerous flying balloon. Heene later admitted that the stunt was done at his parent's instruction "for the show," during a taping of Larry King Live. See Wayne Drehs, 'YouTube Baby' Still Has Hoop Dreams, ESPN CHICAGO, May 13, 2009, [http://sports.espn.go.com/chicago/columns/story?columnist=drehs\\_wayne&id=4159077](http://sports.espn.go.com/chicago/columns/story?columnist=drehs_wayne&id=4159077); CNN, *supra* note 175.

<sup>191</sup> *Famous Quotes About Children*, COMPASSION IN JESUS' NAME, <http://www.compassion.com/child-advocacy/find-your-voice/famous-quotes/default.htm> (last visited Nov. 27, 2012).

<sup>192</sup> See, for example, this video where Alana sees her niece Kaitlyn for the first time. She says in the video "this is the best day of my whole life [...] because baby Kaitlyn is here [...] being an aunt is way better than being a pageant queen." *Alana Meets Baby Kaitlyn, Here Comes Honey Boo Boo*, YOUTUBE, [http://www.youtube.com/watch?v=3\\_s5BKxMqDI](http://www.youtube.com/watch?v=3_s5BKxMqDI) (last visited Nov. 27, 2012).