

UCLA

UCLA Entertainment Law Review

Title

Does Exploiting a Child Amount to Employing a Child? The FLSA's Child Labor Provisions and Children on Reality Television

Permalink

<https://escholarship.org/uc/item/84b725b5>

Journal

UCLA Entertainment Law Review, 17(1)

ISSN

1073-2896

Author

Podlas, Kimberlianne

Publication Date

2010

DOI

10.5070/LR8171027132

Copyright Information

Copyright 2010 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

Does Exploiting a Child Amount to Employing a Child? The FLSA's Child Labor Provisions and Children on Reality Television

by Kimberlianne Podlas*

I. INTRODUCTION

In the past decade, reality television has become a mainstay of entertainment programming. One of the more common types of reality television is the fly-on-the-wall or voyeur vérité program that captures the drama of real people in real life.¹ Examples include *Jon & Kate Plus 8*, *Trading Spouses*, and *Teen Mom*. As these shows have multiplied, so have the number of children appearing in reality television.²

Unfortunately, recent publicity surrounding some of these shows has prompted questions about the welfare of “reality children” and the motives of their parents. For example, in the last year alone, the Pennsylvania Department of Labor investigated complaints that the

* Kimberlianne Podlas is an Assistant Professor of Media Law at the University of North Carolina, Greensboro

¹ Although scholars have yet to agree on a single definition of “reality television,” see e.g., JONATHAN BIGNELL, *BIG BROTHER: REALITY TV IN THE TWENTY-FIRST CENTURY* 1-2, 8 (Palgrave Macmillan 2005); ANNETTE HILL, *REALITY TV: AUDIENCES AND POPULAR FACTUAL TELEVISION 2* (Routledge 2005); CHRISTOPHER J. WRIGHT, *TRIBAL WARFARE 1* (Lexington Books 2006), most agree that unscripted, day-in-the-life shows filming real people qualify as a form of reality television. BIGNELL, *supra*, at 1-2; ANITA BIRESSI & HEATHER NUNN, *REALITY TV: REALISM AND REVELATION 2*, 144 (Wallflower Press 2005); WALTER CUMMINS & GEORGE GORDON, *PROGRAMMING OUR LIVES: TELEVISION AND AMERICAN IDENTITY* 37-39 (Praeger 2006); HILL, *supra*, at 2-5, 55; WRIGHT, *supra*, at 1.

² Michael Schneider, *Child Reality Show Craze Vexes Critics*, *DAILY VARIETY*, Oct. 4, 2007, www.variety.com/article/VR1117973385.html?categoryid=1071&cs=1&query=reality+tv+children (Wife Swap, Trading Spouses, Supernanny, and Nanny 911 frequently put minors at the center of the action).

Gosselin children (of *Jon & Kate* fame) were working illegally;³ Richard Heene made his son (who will be forever known as “Balloon Boy”) the lynchpin of his scheme to obtain a reality TV show;⁴ and, a petition to appoint a guardian *ad litem* for the Suleman octuplets accused their mother of using them to leverage her own media opportunities.⁵ A few years earlier, *Kid Nation* suggested the lengths to which networks would go and the degree of exploitation parents would allow in the name of reality TV.⁶

Navigating childhood is difficult enough without being subjected to public scrutiny and cameras following your every move. History, however, shows that the prospect of money and fame can distract parents from protecting their children’s best interests. When parents pursue their own aspirations at the expense of their children’s emotional welfare, children risk being exploited.⁷ Consequently, attention has turned to federal child labor laws and the protections they may offer “reality children.”

Accordingly, this article considers whether children who appear or participate in reality television programs are protected by the Fair Labor Standards Act (FLSA), specifically its prohibitions against oppressive child labor. After a brief introduction of reality television and its participants, this article recounts the risks and exploitation that children on reality television face. With this foundation, the article provides an overview of the FLSA, focusing on the critical concepts of “work” and “employment.” It then turns to the FLSA’s child labor provisions that prohibit the employment of children under a certain age, as well as the “Shirley Temple Act,” which exempts child actors and performers from those prohibitions. Next, the article analyzes whether reality television participation constitutes “work” or “employment.” In doing so, the article draws on case law where a

³ Dave Itzkoff, *‘Jon & Kate’ Plus a Labor Complaint*, N.Y. TIMES, May 30, 2009, at C2.

⁴ ENT. WKLY., *News Monitor & Notes*, Nov. 6, 2009, at 16.

⁵ *Suleman v. Super. Ct.*, 2009 WL 2437252 (Cal. Ct. App. Aug. 10, 2009), No. G04239 (petition filed May 4, 2009) (amended petition filed June 8, 2009).

⁶ Maria Elena Fernandez, *‘Kid Nation’ Puts Hollywood Labor Tension into Sharp Focus*, L.A. TIMES, Aug. 29, 2007, at A1; 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, 595-96 (2009); Maureen Ryan, *What Were ‘Kid Nation’ Parents Thinking?*, CHI. TRIB., Sep. 4, 2007, at 12; Schneider, *supra* note 2.

⁷ Jaime Buerger, *Kids in the Crossfire*, US WEEKLY, Nov. 2, 2009, at 54, 54-55. Some sources reported that the parents spent increasingly less time with their children and that “nannies [were] doing 95% of the work.” Kevin O’Leary, *Inside Their Battle*, US WEEKLY, Oct 19, 2009, at 44, 48.

television entertainment product has included film of an individual as “raw material” or where a parent has allowed the media to exploit a child. Ultimately, this article concludes that while employing a child in oppressive labor amounts to exploitation, exploiting a child’s work on a reality television series does not constitute oppressive child labor as forbidden by the FLSA.

II. REALITY TELEVISION

Although once considered a trend, reality television has become a staple of television programming.⁸ Reality television’s lower-risk financing models,⁹ low production costs,¹⁰ and ability to draw demographically-cherished audiences¹¹ make it particularly appealing to networks.¹² As a result, dozens of shows exemplifying a wide variety of reality styles¹³ now populate the television schedule.¹⁴ These

⁸ DAVID S. ESCOFFERY, INTRODUCTION TO HOW REAL IS REALITY TV?: ESSAYS ON REPRESENTATION AND TRUTH 1, 1-3 (David S. ESCOFFERY ed., 2006); RICHARD M. HUFF, REALITY TELEVISION ix-x, 11 (Praeger 2006); HENRY JENKINS CONVERGENCE CULTURE 25 (New York University Press 2006); JASON MITTELL, TELEVISION AND AMERICAN CULTURE 86 (Oxford University Press 2009). Today’s reality television is not a wholly new genre, but a hybrid of earlier forms of reality adapted to the contemporary television screen. Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs Illegal Contests In Violation Of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141, 143-45 (2007). For a description of its development and economic value, see Podlas, *supra* note 8, at 143-48.

⁹ Reality television shows generally do not use the deficit-financing model common to scripted television. Consequently, networks do not carry the same up-front financing risks. MITTELL, *supra* note 8, at 90-91; see also HILL, *supra* note 1, at 3-7 (describing deregulation’s impact on success of reality TV).

¹⁰ For instance, reality programs do not require as many writers, see James Poniewozik, *How Reality TV Fakes It*, TIME, Jan. 29, 2006, at 60, or replaces them with “story shapers.” MITTELL, *supra* note 8, at 86-87.

¹¹ Podlas, *supra* note 8, at 147-48; MITTELL, *supra* note 8, at 90; JENKINS, *supra* note 8, at 59-60, 66 (describing American Idol’s advertising base).

¹² Podlas, *supra* note 8, at 148; Alexis Miller, *Reality Check For Production Companies: Why Writers On Reality Television Are Entitled To Overtime Pay*, 27 LOY. L.A. ENT. L. REV. 185, 189-90 (2006/07); MITTELL, *supra* note 8, at 9.

¹³ The Directors Guild of America (“DGA”) defines a “reality series” as an “unscripted” entertainment program depicting actual people, that also includes one or more of the following components:

the program’s premise, circumstances or situations are manipulated for the purpose of creating the program; the program uses contrived, manipulated or staged elements, including re-enactments or highly stylized production or editorial devices; the program may or may not include a prize and/or a competition.

DGA, “The Model Reality TV Agreement,”

http://www.dga.org/news/v29_2/realityagreementpoints.php3 (last visited April 10, 2010).

¹⁴ Anne Becker, *Betting on Reality*, BROADCASTING & CABLE, Aug. 8, 2005, at 19; HUFF,

range from “talent” competitions such as *American Idol* and *So You Think You Can Dance*,¹⁵ to producer-constructed competition programs such as *Survivor* and *The Amazing Race*,¹⁶ to fly-on-the-wall, or voyeur vérité, programs that film people in their real lives, such as the *Real Housewives* series and *Jon & Kate Plus 8*.¹⁷

A. Reality TV Participants

The individuals featured in these programs participate for a variety of reasons. Some compete for a prize, such as a recording contract or money (as in *American Idol* or *Project Runway*); some seek adventure or participate for the sake of the experience;¹⁸ and a few, usually celebrities,¹⁹ receive an appearance fee.

Many participants, however, especially those in voyeur vérité shows, are not motivated by a prize or short-term monetary gain,²⁰ but by the prospect of fame.²¹ Reality television has the unique ability to showcase an ordinary person as a potential star,²² or to provide them with a public stage that is otherwise unavailable.²³ It can also act as a

supra note 8, at x.

¹⁵ Podlas, *supra* note 8, at 147. The DGA Agreement does not apply to variety programs such as *American Idol* or traditional quiz and game shows. These are covered by other DGA agreements. DGA, *supra* note 13.

¹⁶ Steven Reiss & James Wiltz, *Why America Loves Reality TV*, PSYCHOL. TODAY, Sep. 1, 2001, at 52, 53.

¹⁷ Media scholars cite reality television’s voyeuristic appeal as an explanation for its popularity. Lemi Baruh, *Publicized Intimacies in Reality Television: An Analysis of Voyeuristic Content and Its Contribution to the Appeal of Reality Programming*, 53 J. BROADCASTING & ELECTRONIC MEDIA 190, 190-92 (2009).

¹⁸ BIRESSI & NUNN, *supra* note 1, at 27.

¹⁹ Celebrity participants may also hope to re-start a career or alter the public’s perception of them. BIGNELL, *supra* note 1.

²⁰ Some reality TV parents have claimed that they appeared in reality television for their children’s economic benefit. Kate Ward, *Stupid Parents + Reality = Kids at Risk*, ENT. WKLY., Oct. 30, 2009, at 30, 31.

²¹ Colleen Carroll Campbell, Editorial, *Exploitative Reality Shows Degrade Us, Too*, ST. LOUIS POST-DISPATCH, June 25, 2009, at A15; Ward, *supra* note 20, at 30; BIRESSI & NUNN, *supra* note 1, at 147. A 2005 survey by The Washington Post, Henry J. Kaiser Family Foundation, and Harvard University found that almost 30% of teenagers believe they will be famous someday. A 2006 study of British teenagers found that more than 10% teenagers would forgo an education for the chance to appear on television, and consider fame a “great way to earn money without skills or qualifications.” Carroll Campbell, *supra*.

²² BIRESSI & NUNN, *supra* note 1, at 144-45.

²³ Carroll Campbell, *supra* note 21; Ward, *supra* note 20, at 30; Kelley Tiffany, *Reality Show Participants: Employees or Independent Contractors?*, 32 EMP. REL. L.J. 15 (2006). These reality participants seem to embody our growing “confessional culture,” where people share personal information and intimate revelations, to strangers and even television programs. The proliferation of reality television programs is emblematic of confessional culture. Juliet

possible springboard to future media opportunities.²⁴ Indeed, some reality applicants are so eager to be cast that they are willing to deceive producers²⁵ and even, break the law.²⁶

These less admirable motivations were exemplified by Richard Heene. Heene, a two-time participant on ABC's reality show *Wife Swap*,²⁷ had been pitching a reality television program featuring him and his family.²⁸ Unfortunately, he had not attracted any network interest. Hoping to make himself "more marketable for future media interest"²⁹ and land a reality series,³⁰ Heene crafted the "Balloon Boy" hoax, where he claimed that his six-year old son had been carried off in a home-made weather balloon.³¹ Ultimately, the boy was found hiding in the attic, and the scheme quickly unraveled: the next day, as the family was making the rounds on morning news shows, the son admitted to CNN "we did this for the show."³²

B. Children on Reality Television

Although adults account for the majority of reality television participants, as the number of family-focused voyeur vérité programs has increased, so has the number of child participants. Children are

Williams, *Confessional Culture in* ENCYCLOPEDIA OF PRIVACY 116 (Ed. William G. Staples, 2007).

²⁴ CUMMINS & GORDON, *supra* note 1, at 38-40, 41-42; BIRESSI & NUNN, *supra* note 1, at 144-45; BIGNELL, *supra* note 1, at 91; HUFF, *supra* note 8, at 150-64 (detailing ways reality contestants parlay participation into quasi-celebrity). For example, Elizabeth (Filarski) Hasselbeck parlayed her 15 minutes of Survivor fame into a full-time gig on ABC's *The View*. As evidenced by his \$5 million lawsuit alleging that TLC had persuaded media outlets not to work with him, Jon Gosselin apparently was hoping to leverage his reality experience into other media opportunities. PEOPLE, *Legal Matters*, Nov. 30, 2009, at 165.

²⁵ Brian Lowry, *It Takes One To Know One: Reality Casting Is Its Own Drama*, DAILY VARIETY, Mar. 31, 2009.

²⁶ Matt Webb Mitovich, *How Far Will People Go To Be On TV?*, TV GUIDE MAGAZINE, Oct. 2009, at 6.

²⁷ Ward, *supra* note 20, at 30; Mara Reinstein, *Their Dark Family Secrets*, US WEEKLY, Nov. 2, 2009, at 50-51. Heene appeared on *Wife Swap* twice. Once, the swapped wife presciently warned "You are leading your family into a science experiment that's going to blow up in your face." Ward, *supra* note 20, at 30.

²⁸ Ward, *supra* note 20, at 30; Reinstein, *supra* note 27, at 49-50.

²⁹ ENT. WKLY., *supra* note 6.

³⁰ Mitovich, *supra* note 26, at 6.

³¹ Ward, *supra* note 20, at 30.

³² Reinstein, *supra* note 27, at 49. In December, Heene was sentenced to 90 days in jail, 4 years' probation, and 400 hours of community service. ENT. WEEKLY, Jan. 8, 2020, at 21. His wife Mayumi Heene received 20 days in jail, 4 years' probation, and 120 hours of community service. *Id.*

featured on many shows such as ABC's *Supernanny*, MTV's *Teen Mom* and *16 and Pregnant*,³³ and much of TLC's schedule, e.g., *Jon & Kate Plus 8*, *The Baby Borrowers*, *Table for Twelve*, and *19 Kids and Counting*. Octomom Nadya Suleman recently signed a contract for herself and her children to appear in a British reality show.³⁴

Perhaps the most notorious of these programs is *Jon & Kate Plus 8*. *Jon & Kate Plus 8* featured the lives of Jon and Kate Gosselin, their 5-year-old sextuplets, and nine-year-old twins.³⁵ The show ran for five seasons, and then, in May 2009, the couple announced that they were divorcing.³⁶ Nonetheless, they insisted that the split had not been precipitated by the program and would not interfere with the show.³⁷ Despite the season premier's attracting a record ten million viewers (due in part to speculation about the divorce),³⁸ six months later the Gosselins' relationship had degenerated into tabloid fodder,³⁹ and the show was cancelled.⁴⁰

Just as Jon and Kate asserted that inviting cameras into their private life had not impacted their marriage, they likewise claimed that this exposure had not exploited their children.⁴¹ In fact, after the series' conclusion, Kate implied that any harm to her children was due *not* to their appearing on the program, but rather, to the program's cancellation.⁴²

C. The Welfare of Child Participants

Appearing on reality television can take a toll on the lives of its

³³ Tanner Stransky, *MTV Gets Serious*, ENT. WKLY., Jan. 22, 2010, at 55.

³⁴ Jenice Armstrong, *Kids in the Spotlight*, PHILADELPHIA DAILY NEWS, June 9, 2009, at 33; see also *Greenstein v. Greif Co.*, 2009 WL 117368 at *2 (Cal. Ct. App. Jan. 20, 2009).

³⁵ Meg Green, *Jon & Kate Plus 8 Divided = Potential Insurance Claim?*, BEST NEWSWIRE, Jul. 6, 2009 (3 and 7 year old children); Carroll Campbell, *supra* note 21 (5 and 8 year old children).

³⁶ Carroll Campbell, *supra* note 21.

³⁷ *Id.*; Tiffanie Green, *Jon & Kate: Final Numbers*, TV GUIDE MAG., Dec. 6, at 14.

³⁸ Armstrong, *supra* note 34; Carroll Campbell, *supra* note 21

³⁹ See *The Year That Was*, ENT. WKLY., Dec. 25 2009, at 28.

⁴⁰ The divorce received more attention than the show. By mid-October, ratings had fallen to 1.6 million. Stransky, *supra* note 33. On September 29, TLC re-christened the show *Kate Plus 8*. O'Leary, *supra* note 7, at 45.

⁴¹ Carroll Campbell, *supra* note 21.

⁴² *Barbara Walters' The 10 Most Fascinating People of 2009* (ABC television broadcast Dec. 9, 2009). Kate explained to Barbara Walters that when she told them the crew was not returning and the children would no longer be on TV, all eight "sobbed" in the car "all the way home." *Id.*

participants.⁴³ The opportunity to be on reality television comes at a price, and that price is the participant's loss of privacy and potential for humiliation. Whereas an adult can make an informed, voluntary decision to expose herself to millions of viewers⁴⁴ and weigh the potential of fame against the potential for humiliation, a child, however, cannot. Instead, a child's welfare and participation is determined by his or her parent.⁴⁵

Although parents are presumed to protect the interests of their children, the prospect of money and fame can undercut that presumption.⁴⁶ In fact, parents have thrust their children into the spotlight for financial gain or to promote their own celebrity and in doing so, have compromised the well-being of their children.⁴⁷ As many famous cases attest, parents can get swept up in the money and perks of fame, and fail to put their child's best interests first.⁴⁸ Childhood abounds with complex psychological issues, which are exacerbated when a camera is added to the mix⁴⁹ Moreover, as reality television explores new ways and intrusive tactics to capture children's rawest emotions, these young, vulnerable participants are subjected to both physical and psychological risks.⁵⁰

These problems are exacerbated when parents harbor their own

⁴³ Armstrong, *supra* note 34 (opining that cameras may have exacerbated Jon and Kate's problems).

⁴⁴ *Id.*; Greenberg, *supra* note 6, at 603-604; Armstrong, *supra* note 34; *see also* Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 808 (Ct. App. 2002).

⁴⁵ Jessica Krieg, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 432 (2004) (stage parents are not always reliable defenders of their children); Greenberg, *supra* note 6, at 604-05.

⁴⁶ Mitovich, *supra* note 26, at 7; *cf.* Krieg, *supra* note 46, at 429.

⁴⁷ Mitovich, *supra* note 26, at 7 (quoting psychotherapist Amy Goldstein); Armstrong, *supra* note 34; Carroll Campbell, *supra* note 21. Generally, a parent has the right to retain a minor child's earnings. Siegel, *supra* note 3, at 430-31; Staenberg & Stuart, *supra* note 49, at 24-27. Florida, however, is unique in that statute provides that a child performer's earnings belong to the child. *See* Fla. Stat. Ann. 743.08(3)(a) (West 2006).

⁴⁸ Krieg, *supra* note 46, at 432. Among such children are gymnast Dominique Moceanu and actors Macaulay Culkin, and Jackie Coogan. *Id.* Coogan's parents squandered his childhood earnings, leaving him penniless. This prompted California to enact legislation in 1939, that, if an employer sought court approval of a contract with a child actor (thus protecting the employer the child's disaffirming the contract), a court was permitted to establish trust for a portion of the minor's earnings. *Id.* at 433-34; *see generally* Senate Judiciary Committee, Committee Analysis of SB 1162, at 2 (Apr. 13, 1999).

⁴⁹ Marc R. Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, BEVERLY HILLS B. ASS'N J., Summer/Fall 1997, at 21.

⁵⁰ Teresa Wiltz, *On Reality TV, Who's Minding the Kids? More Shows Raise Issue of Exploitation*, WASHINGTON POST, Jul. 26, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/25/AR2008072503642.html>.

aspirations for fame.⁵¹ One reality producer explained that “[p]arents get blinded by the lights, the fame, and the lure of Hollywood, and are willing to do anything to get themselves on television, including putting their children in harm’s way.”⁵² As a result, children on reality TV risk being exploited.⁵³ Indeed, Heene made his son the lynchpin of his plan to obtain a reality show, and the Gosselins have been accused of pursuing fame at the expense of the emotional well-being of their children.⁵⁴

Consequently, several parties, from child advocates to former child actors to the entertainment industry itself, have voiced concerns about the welfare of children participating in reality television.⁵⁵ Indeed, this past fall, the Pennsylvania Department of Labor initiated an investigation arising from a complaint that the Gosselin children were being subjected to long hours of filming⁵⁶ and working in contravention of the state’s child labor laws.⁵⁷ Jon Gosselin, himself, later alleged that TLC had failed to obtain work permits for his children.⁵⁸ In a case involving Nadya “Octomom” Suleman’s octuplets, an individual sought to be appointed guardian *ad litem* in order to protect the children’s business opportunities and endorsement potential and also to ensure “that the children are not exploited.”⁵⁹ The potential for reality television’s disregarding the welfare of child participants was first brought to the forefront by *Kid Nation*, a

⁵¹ Krieg, *supra* note 46, at 429.

⁵² Ward, *supra* note 20, at 30 (quoting television producer Tom Forman).

⁵³ Armstrong, *supra* note 34; Wiltz, *supra* note 50.

⁵⁴ Buerger, *supra* note 7, at 54-55. Some sources reported that, as the show rose in popularity, the parents were spending increasingly less time with their children and the “nannies [were] doing 95% of the work.” O’Leary, *supra* note 7, at 48. As the TLC show came to a close, both Jon and Kate professed their desires to star in their own, respective, reality shows. O’Leary, *supra* note 7, at 47.

⁵⁵ Greenberg, *supra* note 6, at 596; Ward, *supra* note 20, at 31; Wiltz, *supra* note 50; see also Scott Collins, *Kids in Reality TV’s Tender Care*, L.A. TIMES, Aug. 27, 2007, at E1 (“Hollywood has enjoyed an exemption [from labor laws] for kid actors since the 1930s. *Kid Nation* suggests it might be time to revisit that exemption”).

⁵⁶ Carroll Campbell, *supra* note 21 (subjected to long hours in order to satisfy their parents’ desire for money and fame).

⁵⁷ Itzkoff, *supra* note 3; Armstrong, *supra* note 34.

⁵⁸ Ivory Jeff Clinton, *Passages*, PEOPLE, Nov. 30, 2009, at 165. O’Leary, *supra* note 7, at 47.

⁵⁹ *Suleman v. Super. Ct.*, 2009 WL 2437252, (Cal. Ct. App. Aug. 10, 2009). On May 4, 2009, an “interested person,” filed a petition for guardianship of the estate of the Suleman octuplets. *In re Guardianship of Estate of Suleman*, No. 30-2009-00265518-PR-GE-LJC (filed May 4, 2009); (amended petition filed June 8, 2009). An appellate court, however, found “no evidence” that a guardian *ad litem* was needed to protect the interests of the children. *Id.* at *2-3.

Survivor-by-way-of-Lord of the Flies program featuring children. The program's premiere was marred by a string of accusations that CBS evaded child labor laws and subjected children to illegal working conditions and neglect.⁶⁰

The past year's reality parenting trifecta of Gosselin-Suleman-Heene has demonstrated that concerns about child exploitation are neither unwarranted nor confined to sensationalistic programs. Rather, such concerns also arise in the context of seemingly banal family-focused, voyeur *vérité* programs. Indeed, in some ways, the seeming "normalcy" of these situations can obscure red flags. Consequently, attention has returned to the welfare of reality children and whether legal mechanisms, specifically, federal child labor law, exist to protect them.

III. FAIR LABOR STANDARDS ACT

The primary federal law regulating labor practices is the 1938 Fair Labor Standards Act (FLSA).⁶¹ The FLSA was enacted to eliminate working conditions detrimental to the health and well-being of workers, including low wages and long hours.⁶² Accordingly, it established a national minimum wage, maximum working hour and overtime provisions, and child labor standards.⁶³

The FLSA is the primary federal law regulating child labor.⁶⁴ Its working conditions and wage protections apply to child workers, but the statute also includes provisions that apply specifically to children. Most importantly, these provisions prohibit, among other things, the

⁶⁰ Greenberg, *supra* note 6, at 596; Fernandez, *supra* note 6. The county sheriff launched an investigation into criminal violations, but found none. *Id.*

⁶¹ 29 U.S.C. §§ 201-219 (West 2010). The Fair Labor Standards Act was part of the social legislation of the 1930's. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947).

⁶² According to committee reports on the bill, the Act had both humanitarian and business-oriented goals. It sought to increase employment and ensure a fair day's pay for a fair day's work by raising the wages of the most poorly paid workers and reducing the hours of those most overworked, thereby correcting the inequalities in the cost of producing goods and preventing unfair competition. H. R. 1452, 75th Cong., 1st Sess., H. R. 2182, 75th Cong., 3d Sess., S. R. 884, 75th Cong., 1st Sess.; *see also* *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

⁶³ *Rutherford*, 331 U.S. 722 at 727.

⁶⁴ The purpose of the child labor provisions was also twofold: (1) to protect children from, if not abolish, harmful labor practices, and (2) to protect adults from the competition and compensation of minors. *Lenroot v. W.U. Telegraph*, 52 F. Supp. 142 (S.D.N.Y.), *rev'd on other grounds*, 323 U.S. 490 (1945); *Lenroot v. Kemp*, 153 F.2d 153 (5th Cir. 1946).

employment of children under sixteen.⁶⁵

A. Work Activity

The FLSA does not apply to every situation involving contract, payment, or benefit to another party, but only to activities deemed “work” performed by an employee for an employer.⁶⁶ Consequently, the threshold issue is determining whether the activities performed by an individual constitute “work.”

The Supreme Court has defined work as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”⁶⁷ This focuses on the nature of the activity performed as well as on who controls it and realizes its benefit. This definition is broad,⁶⁸ and encapsulates what is commonly understood to be “work” or “employment,”⁶⁹ even if the employer has not formally acknowledged it as such.⁷⁰

Though physical or mental exertion is typical of work, it is not always a pre-requisite for it.⁷¹ Waiting or being on call may be inherent in a job, as with a guard or a fire-fighter who is hired in case of an event; in such occupations, refraining from other activity is necessary to ensure immediate readiness to serve.⁷² Because that idle time is controlled by the employer and primarily for its benefit, those

⁶⁵ Siegel, *supra* note 3, at 442; 29 U.S.C.A. § 203, § 212 (2010); United States Department of Labor, <http://www.dol.gov/dol/topic/youthlabor/index.htm>.

⁶⁶ *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1468 (9th Cir. 1983).

⁶⁷ *Tenn. Coal*, 321 U.S. 590 at 598.

⁶⁸ *Rutherford*, 331 U.S. at 728.

⁶⁹ *Tenn. Coal*, 321 U.S. at 598. In defining “work,” the Court cited Webster’s New International Dictionary: “To exert oneself physically or mentally for a purpose, esp., in common speech, to exert oneself thus in doing something undertaken chiefly for gain, for improvement in one’s material, intellectual, or physical condition, or under compulsion of any kind, as distinguished from something undertaken primarily for pleasure, sport, or immediate gratification, or as merely incidental to other activities. . .” *Id.* at 598 n.11.

⁷⁰ *Johns v. Stewart*, 57 F.3d 1544 (10th Cir. 1995); *see also* *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2d Cir. 2003).

⁷¹ *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007) (activity need not be cumbersome or involve exertion to constitute work).

⁷² *Tenn. Coal*, 321 U.S. at 599; *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944) (waiting time is compensable if it is “primarily for the benefit of the employer and his business”); *Shupe v. Day*, 113 F. Supp 949, 952 (W. Dist. Va. 1953) (an employer may hire a worker “to do nothing but wait for something to happen”); *Leone v. Mobil Oil Corp.*, 377 F. Supp. 1302, 1303 (D.D.C. 1974) (employee on call).

hours constitute work time.⁷³ Thus, one court held that fire guards at a factory who played cards to pass time (while being ready in case of fire) were, nonetheless, working during those down periods.⁷⁴

Provided an acknowledged employer/employee relationship exists, it is not necessary that every moment of an employee's time result in productive output. Depending on the circumstances, preparatory and clean-up activities can be deemed work⁷⁵ (and thus count toward the FLSA's wage, hour, and overtime rules).⁷⁶ This does not mean that a given activity, such as card-playing, drinking coffee, or sleeping – if judged in isolation – qualifies as “work,” but rather that once an employment relationship exists, it is not severed by a break in productive activity.⁷⁷

The seminal case regarding what constitutes work activity concerned coal miners who were required to arrive on the employer's grounds at a scheduled hour, complete a mandated preparation protocol,⁷⁸ and travel underground to the mine.⁷⁹ The issue was whether this “non-mining” time was compensable work time.⁸⁰ The Court held that although these activities did not produce a direct benefit to the employer, they were undertaken on behalf of and primarily for, the employer and its business. Accordingly, they were to be calculated as work time.⁸¹ Notwithstanding, the FLSA's reach is not limitless. The mere fact that a person performs a task inuring to the benefit of an employer does not automatically render that activity work.⁸² The FLSA's purpose “was to insure that every person whose

⁷³ 29 C.F.R. §§ 778.223, 785.7 (1991); see *Tenn. Coal*, 321 U.S. at 608 (Roberts, J., dissenting).

⁷⁴ *Armour*, 323 U.S. at 132. The guards also slept on the premises between shifts, but that time did not count as “work time.” *Id.*; see also *Irwin v. Clark*, 400 F.2d 882 (9th Cir. 1968) (whether sleep is compensable work time is determined on a case-by-case basis); *Allread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (same); *Gen. Elec. Co. v. Potter*, 208 F.2d 805 (9th Cir. 1953) (same). Another court held that a bowling alley employee who was allowed to bowl while at work was, nonetheless, working and should be compensated for this time. *Wage Claim of Holbeck v. Stevi-West, Inc.*, 783 P.2d 391 (Mont. 1989).

⁷⁵ *De Asencio*, 500 F.3d at 363-64 (donning, doffing, and washing work gear included in work time).

⁷⁶ *Krause v. Swartwood*, 218 N.W. 555 (Minn. 1928) (lunch break).

⁷⁷ *Armour*, 323 U.S. at 132.

⁷⁸ *Tenn. Coal*, 321 U.S. at 593-94.

⁷⁹ *Id.* at 599.

⁸⁰ *Id.* at 592-93. And thus, whether the workweek exceeded the statutory maximum number of hours (which, in turn, would have required overtime pay). *Id.* at 597.

⁸¹ *Id.* at 599.

⁸² See *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (students performing chores to

employment contemplated compensation [w]ould not be compelled to sell his services for less than the prescribed minimum wage,”⁸³ not to transform into employees people who (without any express or implied compensation agreement) work for their own advantage.⁸⁴

For example, a mill contracted with an individual to live in a house on the mill’s property as a deterrent to thieves and trespassers. The mill did not control the day-to-day actions of the resident or require mental or physical exertion, or anything else of him. Therefore, though money exchanged hands and a contractual obligation existed, the court held that no work was performed.⁸⁵

When activities are undertaken voluntarily, rather than at the behest of an employer, or for some other purpose, they do not qualify as work.⁸⁶ Simply put, these activities are not “controlled and required by the employer.”⁸⁷ For example, in *Leone v. Mobil Oil Corp.*, employees were allowed to accompany inspectors on inspections. His practice, however, was neither required nor controlled by the employer, but was purely voluntary. Even though the employee’s presence during the inspections could produce some benefit to the work environment by making it safer, it was purely voluntary on the part of the employee. Consequently, the activity did not constitute work.⁸⁸

In a similar vein, dancing, performing in a production,⁸⁹ or acting in a play or film⁹⁰ can constitute work; but, if these activities are done voluntarily or for another purpose, they do not. In *Taylor v. State*,⁹¹ children sang and performed in theatres under the tutelage of their voice and acting instructor. The children’s participation in the productions was not required by the theatre or teacher, but was voluntary and functioned as practice or a means to enhance their lessons. Although the theatre charged admission to (and profited from)

help defray costs, primarily benefit the students and do not constitute work as contemplated by the FLSA); *Richardson v. Costco Wholesale Corp.*, 169 F. Supp. 2d 56, 61 (D. Conn. 2001). Indeed, driving a friend to the airport or preparing breakfast in bed for a beloved both involve exertion and benefit another party, but the context of friendship or love does not conform to our common understanding of employment.

⁸³ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

⁸⁴ *Id.*

⁸⁵ *Shupe*, 113 F. Supp. at 952.

⁸⁶ *Leone v. Mobil Oil Corp.*, 377 F. Supp. 1302, 1303-04 (D.D.C. 1974).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *State v. Rose*, 51 So. 496 (La. 1910) (interpreting state child labor statute).

⁹⁰ *Smithers v. Metro-Goldwyn-Mayer Studios*, 189 Cal. Rptr. 20 (Ct. App. 1983); *Commonwealth v. Griffith*, 90 N.E. 394 (Mass. 1910) (interpreting state child labor statute).

⁹¹ *Taylor v. State*, 199 N.W. 22 (Neb. 1924) (state child statute).

these performances, the court held that this was not work because the children participated voluntarily and with another purpose in mind.⁹²

B. The Employee and Employer Relationship

Work alone is not enough to bring a putative employee within the ambit of the Act.⁹³ Rather, work must take place within an employment relationship – that is, by an employee for an employer.⁹⁴ If work is performed, but occurs in some other context, such as by an independent contractor or within an educational program, it does not constitute employment, and the FLSA does not apply.

The statute is not helpful in delineating what constitutes an employer or employee. It defines an “employee” as “any individual employed by an employer”⁹⁵ and an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁹⁶ Due to the statute’s linguistic circularity,⁹⁷ the task of defining these terms has been left largely to courts.

Because the FLSA is a remedial statute,⁹⁸ its terms are construed broadly.⁹⁹ Thus, the terms “employer,” “employee,” and “employment” encompass a wider range of actors and situations under the FLSA¹⁰⁰ than they do under.¹⁰¹ The statute even protects individuals who were conventionally thought of as employees, but who lacked a formal request to work or did not hold the correct title.¹⁰²

⁹² *Id.* at 23.

⁹³ *Goldberg v. Whitaker House Cooperative*, 366 U.S. 33 (1961) (Whittaker, J., dissenting).

⁹⁴ *Id.* (FLSA “does not apply in the absence of an employer-employee relationship”); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1468 (9th Cir. 1983) (there must be “employers” within the meaning of the Act); *see also* 29 U.S.C. § 203(d) (2010). Because only statutorily covered employees fall within the Act, the employment status of a worker is central to whether the FLSA applies. *Greenberg, supra* note 6, at 609.

⁹⁵ 29 U.S.C.A. § 203(g) (2010); *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969). The ADEA, 29 U.S.C.S. 630(f) (201), and ERISA, 29 USCS 1002(6) (2010), also use this definition. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

⁹⁶ 29 U.S.C. § 203(d) (2010); *Maldonado v. Lucca*, 629 F. Supp 483 (D. N.J. 1986).

⁹⁷ *Darden*, 503 U.S. at 318 (definition is “circular and explains nothing”).

⁹⁸ *See, e.g., Walling*, 330 U.S. at 148, 152.

⁹⁹ *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir.1979); *Bonnette*, 704 F.2d at 1469; *Johns*, 57 F.3d at 1544; *Zheng*, 355 F.3d at 61.

¹⁰⁰ *Driscoll Strawberry*, 603 F.2d at 754; *Bonnette*, 704 F.2d at 1469.

¹⁰¹ *Walling*, 330 U.S. at 150 (common law categories of “employee” do not control); *Gulf King Shrimp*, 407 F.2d at 512 (master-servant notions not dispositive under FLSA).

¹⁰² *Johns*, 57 F.3d at 1544; *Zheng*, 355 F.3d at 61. In fact, an employment relationship may exist whether either party expressly agrees to it and regardless of the label the parties

C. Economic Reality

Employment is as much a matter of circumstance as it is of consensual agreement.¹⁰³ Therefore, determining whether an individual is an employee or in an employment relationship cannot be reduced to a list of isolated factors or technical concepts.¹⁰⁴ Instead, it requires a factual inquiry into the circumstances¹⁰⁵ and context of the relationship.¹⁰⁶

According to the Supreme Court, the touchstone of this analysis is “economic reality:”¹⁰⁷ “[E]mployees are those who as a matter of economic reality are dependent upon the business to which they render service.”¹⁰⁸ This test focuses on the balance of power in the relationship¹⁰⁹ as a way to ascertain whether the purported employee is working for or controlled by the purported employer, another party,¹¹⁰ or himself¹¹¹ (as an independent businessman or independent contractor¹¹²). In addition, it can reveal whether the relationship is one of employment or of a wholly different nature.¹¹³

attach to it. *Rutherford*, 331 U.S. at 722. The label is relevant only to the extent that it reflects the economic reality of the relationship. *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308 (5th Cir. 1976), *cert. denied*, 429 U.S. 826 (1976); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981).

¹⁰³ *Gulf King Shrimp*, 407 F.2d at 512; *Rutherford*, 331 U.S. at 730.

¹⁰⁴ *Goldberg*, 366 U.S. at 33; *Rutherford*, 331 U.S. at 730.

¹⁰⁵ *Rutherford*, 331 U.S. at 730; *Bonnette*, 704 F.2d at 1469 (quoting *Rutherford*, 331 U.S. at 730).

¹⁰⁶ Douglas W. Murch, Case Comment, *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), 80 N.D.L. REV. 471, 475 (2004).

¹⁰⁷ *Goldberg*, 366 U.S. at 33; *Bonnette*, 704 F.2d at 1469; Jeff Clement, Comment, *Leroehl v. Friends of Minnesota Sinfonia: An Out of Tune Definition of “Employee” Keeps Freelance Musicians from Being Covered by Title VII*, 3 DEPAUL BUS. & COM. L.J. 489 (2005).

¹⁰⁸ *Goldberg*, 366 U.S. at 33.

¹⁰⁹ *Clement*, *supra* note 108, at 489. Economic dependence “does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life. . . . Rather, it examines whether the workers are dependent on a particular business or organization for their continued employment.” *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985).

¹¹⁰ An employee can have more than one employer. *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973), *reh’g denied*, 472 F.2d 1405, *cert. denied*, 414 U.S. 819 (1973); *Maldonado*, 629 F. Supp. at 487.

¹¹¹ *Hodgson v. Ellis Transportation Co.*, 456 F.2d 937 (9th Cir. 1972); *Donovan*, 642 F.2d 141, 143 (5th Cir. 1981); *Nunneley v. Farmers Ins. Exchange*, 564 P.2d 231 (Okla. 1977).

¹¹² Similarly, none of the following protect independent contractors as employees: the ADEA [29 U.S.C.S. 621 (2010)], the ADA [42 U.S.C.A. 12101 (2010)], *McFadden-Peel v. Staten Island Cable*, 873 F. Supp. 757 (E.D. NY 1994), *Bogues v. Township of Trumbull*, 383 F. Supp. 2d 348 (D. Conn. 2005), *Metropolitan Pilots Ass’n LLC v. Schlosburg*, 151 F. Supp. 2d 511 (D. N.J. 2001).

¹¹³ *See Murch*, *supra* note at 107, at 475.

Various factors help to gauge the economic dependence of the alleged employee (i.e., whether he is, in “economic reality,” an independent businessman or an employee of a given employer). Some factors focus on the control exercised by the purported employer.¹¹⁴ These include the putative employer’s degree of control over workers¹¹⁵ and their work; the putative employer’s ability to hire and fire worker and to set daily working conditions;¹¹⁶ whether the work takes place on the putative employer’s premises and with its equipment;¹¹⁷ and whether the services rendered are integral to the putative employer’s business.¹¹⁸ Other factors focus on the worker’s independence and the permanence of the work relationship. These include whether the worker is paid a set amount per job or by the hour, week, or month;¹¹⁹ whether the worker works under the same conditions as acknowledged employees;¹²⁰ whether the relationship is temporary or exhibits some permanence;¹²¹ whether the worker suffers liability for economic loss or realizes profit;¹²² the degree of skill required to perform the work;¹²³ and, the extent to which the work is an independent operation with high autonomy.¹²⁴

Privileging the economic reality of the situation prevents employers from unilaterally labeling individuals as independent contractors or

¹¹⁴ *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), is a widely accepted test for determining employment. Kevin J. Miller, Comment, *Welfare and the Minimum Wage: Are Workforce Participants “Employees” Under the Fair Labor Standards Act*, 66 U. CHI. L. REV. 183, 195 (1999). It focuses, however, on the alleged employer (rather than the employee), judging whether the alleged employer is indeed an employer. Vadim Mahmoudov, *Are Workfare Participants “Employees”?: Legal Issues Presented by a Two-Tiered Labor Force*, 1998 ANN. SURV. AM. L. 349, 359 (1998).

¹¹⁵ *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38 (5th Cir. 1973); *United States v. Silk*, 331 U.S. 704, 716 (1947).

¹¹⁶ *Rutherford*, 331 U.S. at 729-30; *Hodgson*, 471 F.2d at 237-38.

¹¹⁷ *Rutherford*, 331 U.S. at 729-30; *Hodgson*, 471 F.2d at 237-38.

¹¹⁸ *Rutherford*, 331 U.S. at 729-30.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 730. Workers who work side-by-side with employees, performing the same tasks, were employees. *Herman v. Davis Acoustical Corp.*, 21 F. Supp. 2d 1340 (N.D.N.Y. 1998)

¹²¹ *Rutherford*, 331 U.S. at 729-30; *Silk*, 331 U.S. at 716

¹²² *Rutherford*, 331 U.S. at 729-30; *Silk*, 331 U.S. at 716, 729-30.

¹²³ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989); *see also Rutherford*, 331 U.S. at 729-30; *Silk*, 331 U.S. at 716. In *Reid*, the Court had to determine whether a sculpture was a “work for hire” made by an independent contractor or prepared by an employee within the scope of his employment. *Reid*, 490 U.S. at 738.

¹²⁴ *See Maldonado*, 629 F. Supp at 488 (migrant farm workers were employees rather than independent contractors); *Rutherford*, 331 U.S. at 729-30.

apprentices, in order to deny them employee status.¹²⁵ For example, the Circle C strip club claimed that its dancers were not employees because the dancers choreographed their dances and supplied their own costumes.¹²⁶ The facts, however, showed that Circle C scheduled dancers, fined dancers for absences and tardiness, set the minimum prices that dancers were required to charge for table dances, chose music, promulgated workplace rules (e.g., requiring dancers to wear heels, regulating how long they could spend in the dressing room and restroom), and fined dancers who broke the rules.¹²⁷ The court concluded that this degree of control over the dancers was indicative of an employment relationship.¹²⁸ In a similar case, a nightclub tried to use a contract to designate its exotic dancers “independent contractors.”¹²⁹ Notwithstanding the label, the facts showed that the dancers were controlled by and working on behalf of the nightclub.¹³⁰ Consequently, they were not independent contractors but employees.¹³¹

“Employment” can also exist where an employer has not formally requested work or agreed to compensation,¹³² but knew of and accepted the benefit of the work.¹³³ In this way, the employer has “permitted by acquiescence ... [or] suffered by failure to hinder.”¹³⁴ For example, one employer knew that his employee (a trucker) had his underage brother ride with and assist him. Because the employer permitted the child to continue working, the child was deemed employed.¹³⁵ Another employer hired a man to pick and pack figs, but knew that his wife and children would work with him as a family unit. Because the employer was aware of the children’s role and accepted their contribution, the children were employees.¹³⁶

¹²⁵ *Rutherford*, 331 U.S. at 729.

¹²⁶ *Reich v. Circle C Inv.*, 998 F.2d 324, 327 (5th Cir 1993). The costumes, however, had to conform to standards set by Circle C. *Id.*

¹²⁷ *Id.* at 327.

¹²⁸ *Id.* at 328-29.

¹²⁹ *Harrell v. Diamond A Entm’t*, 992 F.Supp 1343 (M.D. Fla. 1997).

¹³⁰ *Id.* at 1349-52.

¹³¹ *Id.* at 1353-54.

¹³² *Walling v. Jackson Terminal Co.*, 148 F.2d 768, 770 (5th Cir. 1945). This also includes instances where an employee works beyond her scheduled hours. *Id.*

¹³³ *Jackson Terminal*, 148 F.2d at 770; *Bond v. Cartwright Little League*, 536 P. 2d 697 (Ariz. 1975); see also 29 C.F.R. §§ 778.223, 785.11 (2010).

¹³⁴ See *Gulf King Shrimp*, 407 F.2d at 512; see also 29 U.S.C.A. § 203(g) (2010) (defining “employment” as “to suffer or permit to work”). The “suffer or permit to work” language originated in child labor statutes. *Darden*, 503 U.S. at 326; *Rutherford*, 331 U.S. at 728 n.7.

¹³⁵ *Mitchell v. Howard*, 37 CCH Labor (D.C. Ga., 1959).

¹³⁶ *Mitchell v. Munier*, 38 CCH Labor (D.C. Ca., 1958).

Sometimes, the situation involves a bilateral relationship, but that relationship is not one of employment. The FLSA does not transform into an employee a person who performs for their own reasons, pleasure, or profit.¹³⁷ For example, volunteers, such as nurse's aids, museum docents, and individuals operating food booths at fundraisers¹³⁸ all work, but they are not economically dependent on the business. Moreover, the relationship's purpose is to enable the worker to contribute to the charity; therefore, this does not qualify as employment.¹³⁹ Prisoners may be required to work, but this does not arise out of an employment relationship.¹⁴⁰ Rather, it is due to and for the purpose of the prisoner's incarceration. Consequently, a prisoner is usually not an employee.¹⁴¹ Similarly, individuals in a group home¹⁴² and participants in a long-term in-patient rehabilitation programs often share housework and work tasks. Again, because the relationship exists primarily to help the participant, it does not amount to employment.¹⁴³ This is also true of an apprentice in a company training program. Not only is the end-result focused on the apprentice's benefit (gaining skills, knowledge, and training), but also his "work does not expedite the company business, but may, and sometimes does, actually impede and retard it."¹⁴⁴ Therefore, he is not

¹³⁷ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (holding that a person whose work serves only his own interest is not the employee of another person who provides him with aid and instruction); *Benshoff v. City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999); *Walling v. Jacksonville Terminal*, 55 F. Supp. 302 (S.D. Fla. 1944), *aff'd* 148 F.2d 768 (5th Cir. 1945) (holding that the FLSA did not intend to transform into an employee every person who had never been and is not an employee).

¹³⁸ *Isaacson v. Penn Community Services, Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971).

¹³⁹ An employment relationship can exist when employees work for charitable organizations or do not receive monetary salaries. For example, although one nonprofit religious organization called workers "associates" and did not pay them salaries, it gave them other items of value, i.e., food, clothing, and shelter, in exchange for their services. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985). This compensation in the form of benefits constituted wages, albeit in a nonstandard form. *Id.* at 301.

¹⁴⁰ *Hale v. Arizona*, 993 F.2d 1387, 1403 (9th Cir. 1993); *Harker v. State Use Indus.*, 990 F.2d 131, 132 (4th Cir. 1993).

¹⁴¹ *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (holding no employee status under the ADEA). In *Williams*, an inmate, who as part of his incarceration, was required to do chores, asserted that he was an employee of the Federal Bureau of Prisons. *Id.* at 996.

¹⁴² 29 C.F.R. § 525.3(g) (2008).

¹⁴³ *Williams v. Strickland*, 87 F.3d 1064, 1068 (9th Cir. 1996) (holding no employee status under the FLSA).

¹⁴⁴ *Walling*, 330 U.S. at 150. Individuals in "training" programs are generally exempt, § 3(e)(11)(g), but if the circumstances disclose that they are engaged in activities that are not training, but for the benefit of the employer, trainees can be deemed employees. *Atkins v. Gen. Motors*, 701 F.2d 1124, 1124 (5th Cir. 1983).

an employee.¹⁴⁵

In one case, college resident advisors (“RAs”) asserted that they were employees because they provided necessary services for the college, the college derived a financial benefit from them, and in exchange, the RAs received financial aid.¹⁴⁶ Although, in isolation, these characteristics could indicate employment, the RAs were also involved in an educational program.¹⁴⁷ Consequently, the court held that, once assessed in the context of its pedagogical aspects, the relationship did not amount to employment.¹⁴⁸

D. Child Labor

When the employment relationship includes children, the FLSA imposes additional restrictions.¹⁴⁹ These child labor provisions endeavor “to protect the safety, health, well-being, and opportunities for schooling of youthful workers.”¹⁵⁰ Some provisions regulate working conditions, such as limiting the number, length, and time of day¹⁵¹ during which a child can work. Others, however, prohibit employing children under a certain age, and in certain jobs.¹⁵²

The primary child labor provision is 29 U.S.C. 212.¹⁵³ It prohibits oppressive child labor in commerce, or by an employer engaged in commerce.¹⁵⁴ To wit:

¹⁴⁵ *Walling*, 330 U.S. at 152 (holding that a person whose work serves only his own interest is not the employee of another person who provides him with aid and instruction).

¹⁴⁶ *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1326 (10th Cir. 1981).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1327; *see also* *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (holding that although students performed chores, which helped defray costs, such performance did not constitute employment). The same is true of college athletes. With regard to scholastics, student-athletes are heavily regulated by the NCAA and their school. With regard to their sport, they must follow the rules of their coaches and school. Should they fail to comply with either set of rules, they jeopardize their college-athlete status. *See Shelton v. Nat’l Collegiate Athletic Ass’n*, 539 F.2d 1197, 1199 (9th Cir. 1976) (declaring NCAA’s rules reasonable in light of its goal in promoting amateur college athletics). Yet, even though this relationship may include contractual elements, its fundamental purpose is education, not employment.

¹⁴⁹ Before the FLSA was passed, Congress enacted the Child Labor Act in 1916. The Supreme Court, however, declared it unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁵⁰ 29 C.F.R. § 570.101 (2008).

¹⁵¹ *See* 29 C.F.R. § 570.119(f) (2008).

¹⁵² *See* Wendy Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994).

¹⁵³ The Department of Labor enforces and sets policy regarding child labor. United States Department of Labor, Youth and Labor, <http://www.dol.gov/dol/topic/youthlabor/index.htm> (last visited May 11, 2010).

¹⁵⁴ *See* 29 C.F.R. § 570.103 (2008). “Commerce” is “trade, commerce, transportation,

No producer, manufacturer or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment . . . in which . . . oppressive child labor has been employed.¹⁵⁵

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.¹⁵⁶

The critical concept of “oppressive child labor” is defined with regard to the age of the child. With regard to children under age 16, any employment is deemed oppressive child labor.¹⁵⁷ Therefore, as a general rule, an employer cannot employ a child under sixteen years of age. With regard to children between ages sixteen and eighteen, however, only jobs that the Secretary of Labor has declared to be particularly hazardous or detrimental to the health or well-being of children are deemed oppressive.¹⁵⁸ Therefore, a child age sixteen or older can be employed, but not in certain types of jobs.¹⁵⁹

E. The Shirley Temple Act Exemptions

Despite its absolutist language, the FLSA exempts several jobs from its prohibition against child labor.¹⁶⁰ Foremost among these is Section 213’s exemption for “any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”¹⁶¹ Therefore, although employing a child

transmission, or communication among the several States.” 29 U.S.C. § 203(b) (2006).

¹⁵⁵ 29 U.S.C. § 212(a) (2006).

¹⁵⁶ 29 U.S.C. § 212(c) (2006).

¹⁵⁷ 29 U.S.C. § 203(l) (2006) (“‘Oppressive child labor’ means a condition of employment under which any employee under the age of sixteen years is employed by an employer . . . in any occupation . . .”).

¹⁵⁸ *Id.* (“‘Oppressive child labor’ means a condition of employment under which . . . any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor has declared to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being.”).

¹⁵⁹ Examples of dangerous work that have been held to be “oppressive child labor” include factory work, work involving dangerous machinery, and heavy physical labor. *See e.g.*, *Wirtz v. Taylor*, 55 CCH Labor (D.C. Ga. 1967) (canning); *Lenroot v. Interstate Bakeries*, 146 F.2d 325 (8th Cir. 1965) (bakery plant); *Goldberg v. Fuller*, 44 CCH Labor (D. Utah 1962) (splitting and loading rocks).

¹⁶⁰ *See* FLSA §§ 13(c), (d) (2004). FLSA § 13(c) exempts a number of activities, as well as removing age restrictions for several jobs.

¹⁶¹ 29 U.S.C. § 213(c)(3) (2006). The Code of Federal Regulations defines a performer as:

under age sixteen is generally prohibited, employing a child under age 16 as an actor is not.

The motivation for this exemption was twofold. In part, Congress exempted child acting because it did not believe it was oppressive labor, but imagined that allowing a child to develop her talents could promote a child's best interest.¹⁶² In part, Congress exempted child acting because at the time that the Act was being debated, child actor Shirley Temple was enormously popular.¹⁶³ Had the FLSA been passed without the child actor exemption, Temple would have been banned from the screen. Due to this heritage, the exemption is known as the Shirley Temple Act.¹⁶⁴

Although the Shirley Temple Act removes children from the FLSA's prohibition against child labor (thus enabling them to work), it does not remove them from the protections of the Act. Thus, provisions such as minimum wage and hour restrictions still apply to child actors.¹⁶⁵

IV. ANALYSIS: DOES THE FLSA APPLY TO REALITY CHILDREN?

As a threshold issue, in order for the FLSA's prohibitions against child labor to apply to children appearing in reality television programs, the FLSA itself must apply. In order for the FLSA to apply, the activity of participating in a reality television show must constitute work, and this work must be within an employment relationship. If, however, appearing on a reality show cannot be deemed work or the show's participants cannot be deemed employees, then neither the FLSA nor its child labor provisions apply.

Determining whether children (or other participants) appearing on reality TV perform work requires identifying what they do, for whom, and at whose direction. In other words, does the activity constitute

[A] person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. 29 C.F.R. § 550.2(b) (2008).

¹⁶² 82 Cong. Rec. 1780 (1937); 83 Cong. Rec. 7441 (1938).

¹⁶³ *Id.*

¹⁶⁴ 29 U.S.C. §213(c) (2006). The public christened this the Shirley Temple Act in honor of the actress. LESTER DAVID & IRENE DAVID, *THE SHIRLEY TEMPLE STORY* 23 (1983).

¹⁶⁵ See 29 C.F.R. § 570.103(a) (2008); V. Nathaniel Ang, Comment, *Teenage Employment Emancipation and the Law*, 9 U. PA. J. LAB. & EMP. L. 389, 395 (2007).

physical or mental exertion; is its performance controlled or required by the reality TV show;¹⁶⁶ and is it pursued necessarily and primarily for the benefit of the show?¹⁶⁷

A. The Nature of Reality TV

Ascertaining the nature of a reality child's activity requires understanding the nature of reality television. Reality television, especially the fly-on-the-wall style that includes children, is rooted in the depiction of real people in real life.¹⁶⁸ Real life is both the stage for¹⁶⁹ and source of the drama.¹⁷⁰ Accordingly, participants are left to do whatever they choose, say whatever they want, and behave however they wish.¹⁷¹ The role of the television show and its crew is to allow events to unfold,¹⁷² film them, and then edit that footage into a story.¹⁷³

B. Casting

Because of reality television's unscripted nature, it depends heavily on the personalities of the participants. Several reality television producers stress that the key to reality television is casting:¹⁷⁴ "You can have the best concept, but if you don't have the right cast, then the

¹⁶⁶ For purposes of clarity, this portion of the article uses "TV show" or "reality television program" inclusively to refer to the makers, producers, owners, crew, editors, and others who create or are responsible for the program.

¹⁶⁷ See *Tenn. Coal*, 321 U.S. 590, 598 (1944).

¹⁶⁸ BIRESSI & NUNN, *supra* note 1, at 36; WRIGHT, *supra* note 1, at 1, 39. The aim of reality television is to take viewers out of their own experience, while providing them with a familiar reference point. BIRESSI & NUNN, *supra* note 1, at 146, 155.

¹⁶⁹ BIRESSI & NUNN, *supra* note 1, at 66 (showing that the domestic sphere is the stage for interaction among participants).

¹⁷⁰ Tiffany, *supra* note 23, at 16 ("The characteristics of reality television include using average people over professional actors in an unscripted setting as the producers capture the drama of real life events unfolding in an often stressful and at times chaotic environment."). The programs that are situated in the mundane have the potential for delivering a dramatic moment "so honest that the viewer can't help but respond with real emotion." Karen Idelson, *What Makes Reality Stand Out?*, BROADCASTING & CABLE, June 8, 2009, at 28.

¹⁷¹ *Greenstein v. Greif Co.*, No. B200962, 2009 WL 117368 (Cal. App. Dep't Super. Ct. Jan. 20, 2009) (describing nature of the reality program *Gene Simmons Family Jewels*).

¹⁷² Tiffany, *supra* note 23, at 31 (noting the necessity of employing a "minimal contact approach between participants and the crew to capture the essence of reality drama").

¹⁷³ HILL, *supra* note 1, at 39; SUSAN MURRAY & LAURIE OULETTE, REALITY TV: REMAKING TELEVISION CULTURE 4 (2004); WRIGHT, *supra* note 1, at 1; Miller, *supra* note 12, at 187-88.

¹⁷⁴ WRIGHT, *supra* note 1, at 1; Joseph Adalian, *Vet Casting Maven VP For Nash, Taylor-Jordan Overseeing Casting On MTV 'Superhero'*, DAILY VARIETY, June 7, 2004; Idelson, *supra* note 170. According to the executive producer of *Deadliest Catch* and *Monster Garage*, "It's all about casting." Idelson, *supra* note 170.

chances are the show will not be a success.”¹⁷⁵ While participants must be able to “give you that narrative and seem natural”¹⁷⁶ or spontaneous,¹⁷⁷ they must also exude some kind of star quality or¹⁷⁸ be “larger than life.”¹⁷⁹ Consequently, these shows “look[] for energetic people who aren’t afraid to speak their minds. . . [and then] let the guys do what they want. . . .”¹⁸⁰

C. Editing

Of course, reality TV is not simply surveillance tape. Participants’ lives may be harvested as raw materials, and filming may transform those into tangibles, but a reality television show is made in the editing room. Story shapers, writers and editors cull raw footage to craft story-lines.¹⁸¹ By searching “footage that may have happened days or weeks apart,”¹⁸² sequencing it,¹⁸³ editing it, and splicing together dialogue,¹⁸⁴ they create a story complete with crises,¹⁸⁵ back-stories, emotional journeys,¹⁸⁶ stock characters,¹⁸⁷ and romances and rivalries.¹⁸⁸ To

¹⁷⁵ Adalian, *supra* note 173.

¹⁷⁶ Idelson, *supra* note 169.

¹⁷⁷ CUMMINS & GORDON, *supra* note 1, at 55.

¹⁷⁸ Idelson, *supra* note 169 (quoting David McKillop, the History Channel’s Senior Vice President of Development and Programming).

¹⁷⁹ *Id.* (“You need someone larger than life because often the television screen makes a big personality smaller.”).

¹⁸⁰ Ingela Ratledge, *Is It Just Me? Or Did the Reality Show Conveyor Belt of Love Seem Scripted?*, TV GUIDE MAG., Jan. 18-24, 2010 (referring to participants on *Conveyor Belt of Love*).

¹⁸¹ HILL, *supra* note 1, at 17; Miller, *supra* note 12, at 185-86 (describing how the proper designation of reality writers or story shapers has been hotly contested); Jeff Bartsch, *Editors in the Writers Guild? ... Say What?!*, Writers Guild of America, <http://www.wga.org/organizesub.aspx?id=1072> (last visited Mar. 16, 2010). *See also* Complaint at 21, *Shriver v. Rocket Sci. Labs., L.L.C.*, No. BC 338746 (Cal. Super. Ct. filed Aug. 23, 2005).

¹⁸² David Rupel, *How Reality TV Works*, WRITERS GUILD OF AMERICA, <http://www.wga.org/organizesub.aspx?id=1091>.

¹⁸³ WRIGHT, *supra* note 1, at 64-66.

¹⁸⁴ *Id.* at 7-8 (editing on *Survivor*); Miller, *supra* note 12, at 201-02; Rodney Ho, *Labor Dispute Raises Curtain on Writers of TV Reality*, ATLANTA J. CONST., Sep. 4, 2006, at 1A (“In reality TV writers have to phrase out key quotes and moments as opposed to scripting actual lines.”). One reality television writer explained that the main component in writing for reality television is discarding footage. Ho, *supra*. *See also* WRIGHT, *supra* note 1, at 7-9 (describing the omission of *Survivor* footage).

¹⁸⁵ BIGNELL, *supra* note 1, at 65.

¹⁸⁶ WRIGHT, *supra* note 1, at 8-9; Bartsch, *supra* note 180

¹⁸⁷ *U.S. v. Hatch*, 514 F.3d 145, 153-4 (1st Cir. 2008); BIRESSI & NUNN, *supra* note 1, at 28-29 (discussing reality TV’s presentation of participants).

¹⁸⁸ WRIGHT, *supra* note 1, at 63-67 (editing implied romantic affairs between *Survivor*

enhance the structure or provide context, editors and writers even add music, sound effects, and narration.¹⁸⁹ The end-result of this work is the creation that viewers know as the reality television show.

D. The Character of the Activity

Fundamentally, and as required by the genre, the core activity in which voyeur vérité reality TV participants engage is living daily life, be it parenting eight children or being a child who is parented. By and large, they do nothing different than the rest of us, except that they allow a film crew to see and record it, and a television program to edit and broadcast it.

Going through life, however, is not what we think of as work or employment. The FLSA is meant to cover what is commonly understood to be “work,”¹⁹⁰ not create new categories of employment. Although being a reality show participant can be a stepping stone to an employment opportunity, it does not qualify as a job,¹⁹¹ and is not an acknowledged vocation. Hence, appearing on a reality television program does not amount to “work.”¹⁹²

This is reflected in industry practice. AFTRA, the union representing television performers,¹⁹³ will not represent a mere participant on a reality show¹⁹⁴ because it “do[es] not consider what they are doing to be performing.”¹⁹⁵ Instead, AFTRA represents only individuals it deems “performers.”¹⁹⁶

contestants).

¹⁸⁹ Complaint at 21, *Shriver v. Rocket Sci. Labs., L.L.C.*, No. BC 338746 (Cal. Super. Ct. filed Aug. 23, 2005); BIGNELL, *supra* note 1, at 65, 75-76.

¹⁹⁰ *Tenn. Coal*, 321 U.S. at 597.

¹⁹¹ Fernandez, *supra* note 6 (discussing how participating on a reality TV show is not “working” in the same way that people think of as a job). Indeed, there is no skill required, no standards for satisfactory completion of the task, hours set or payment docked if hours are missed.

¹⁹² In addition, the capture and broadcast of the image does not alter the character of the original activity. A parent might video-tape their child at a birthday party or in a school play, but the fact that the parent posts that video on-line does not retroactively transform the character of the child’s activity into work.

¹⁹³ AFTRA represents performers, whereas SAG represents actors. Screen Actor’s Guild, About Us, <http://www.sag.org/content/about-us> (last visited Mar. 16, 2010).

¹⁹⁴ Edward Wyatt, ‘*Kid Nation*’ Lesson: Be Careful What You Pitch, N.Y. TIMES, Aug. 25, 2007, at B7.

¹⁹⁵ David Lieberman, “*American Idol*” Finalists Now Get Paychecks as Professionals, USA TODAY, Mar. 14, 2007, at 3B.

¹⁹⁶ *Id.* AFTRA will, however, represent the performer-contestants on *Last Comic Standing* and finalists on *American Idol*. An AFTRA spokesman explained that the nature of *American*

Consistent with this (though not dispositive), reality television programs do not treat participants as employees,¹⁹⁷ and participants do not qualify for workers' compensation.¹⁹⁸ The few legal challenges concerning reality television participants also do not refer to them as employees.¹⁹⁹ In fact, Richard Hatch signed an agreement with *Survivor* that he understood he was not an employee.²⁰⁰

Furthermore, being captured on film – be it by a surveillance camera, a parent with a camcorder, or news crew – is not commonly understood to be work. For example, a recreational marathoner engages in significant physical and mental exertion. Although running 26.2 miles is hard work, it is not “work” in the employment sense. Moreover, capturing her run on film will not transform it into work. Hence, if the marathoner competes in the Boston Marathon, and her run is filmed and broadcast by NBC, her underlying activity remains the same; she does not suddenly become an employee of the Boston Athletic League or NBC by virtue of them using footage of her.²⁰¹

Being filmed and appearing on reality television is similar to being filmed and appearing in a documentary film²⁰² or news program.²⁰³ Like reality television programs, filmmakers and journalists position themselves in real life, ask a person to walk through incidents and recite conversations, film that interview, and then edit it into story.²⁰⁴

Idol changes: “Prior to [the finals], they’re just singing in a singing format After that, they’re doing more interactions and set bits” *Id.*

¹⁹⁷ Greenberg, *supra* note 6, at 597; Green, *supra* note 35 (quoting Lorrie McNaught, vice president of entertainment broker Aon/Albert G. Rube); Fernandez, *supra* note 6 (children are not employees; they are participants).

¹⁹⁸ Green, *supra* note 35.

¹⁹⁹ See *U.S. v. Hatch*, 514 F.3d 145 (1st Cir. 2008); *Christakis v. Mark Burnett Prods., No. CV-08-6864-GW(JTLx)*, 2009 U.S. Dist. LEXIS 60751, at *7 (C.D. Cal. 2009) (taking judicial notice of agreement with producers deeming plaintiff “contestant for participation”).

²⁰⁰ *Hatch*, 514 F.3d at 148. Additionally, even when prosecuted for non-payment of taxes on his winnings, Hatch did not assert employee status. *Id.*

²⁰¹ By contrast, a professional marathoner’s training runs and competitive racing would be work (though the professional athlete would be an independent contractor or contestant). Nevertheless, even if running a marathon constituted work, a news crew’s filming of it would not transform the action or create an employment relationship. See, e.g., *Intercontinental Promotions v. MacDonald*, 367 F.2d 293 (5th Cir. 1966) (involving boxers licensed by the state who box for prize money but are not employees).

²⁰² BIGNELL, *supra* note 1, at 13-15 (describing creation of documentary).

²⁰³ Indeed, the contemporary reality TV show is described as the docu-soap adapted to contemporary television. BIGNELL, *supra* note 1, at 62-62, 76; HILL, *supra* note 1, at 57 (explaining reality TV is a partial and revised form of traditional documentary). For a detailing of reality TV’s documentary heritage, see BIGNELL, *supra* note 1, at 10-16, 25-26; see also HILL, *supra* note 1, at 17-38 (describing the path from traditional documentary to contemporary reality TV).

²⁰⁴ In the same way that reality TV creates drama, news and documentaries emphasize the

Although footage of the person is used in the end-product, thereby contributing to it, she is not considered an employee.²⁰⁵

In fact, provided a person consents²⁰⁶ or is in public²⁰⁷ (thus constituting consent²⁰⁸), it is permissible to film them.²⁰⁹ Moreover, filming does not endow the person with employment rights,²¹⁰ or proprietary rights in that footage.²¹¹ Accordingly, it can be used in an entertainment product.²¹²

personal, the sensational, and the dramatic. HILL, *supra* note 1, at 15-17.

²⁰⁵ Nor can he claim misappropriation of his likeness, as the purpose of using the individual is not to advertise a product or gain the benefit of associating the product with the individual's name. See RESTATEMENT (SECOND) OF TORTS § 652C (1977); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).

²⁰⁶ To claim invasion of privacy, the plaintiff must have conducted herself in a manner consistent with an actual expectation of privacy. *Hill v. Nat'l Collegiate Athletic Ass'n.*, 7 Cal. 4th 1, 26 (1994).

²⁰⁷ Businesses such as banks, hotels, and stores often use surveillance cameras to video-record customers. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* 163 (Yale University Press 2007).

²⁰⁸ A person in public must assume that they can be recorded or filmed. *Dempsey v. Nat'l Enquirer*, 702 F. Supp. 927 (D. Me. 1988); *cf.* RESTATEMENT (SECOND) OF TORTS § 652B (1977). Therefore, whatever is overheard or seen in public, embarrassing or not, can be recorded. *Mayhall v. Dennis Stuff, Inc.*, 2002 WL 32113761 (Fla. Cir. Ct. 2002); *Aisenson v. Am. Broad. Co.*, 220 Cal. App. 3d 146, 162-163 (Ct. App. 1990); *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 509 (5th Cir. 1983); *Holman v. Cent. Arkansas Broad. Co.*, 610 F.2d 542 (8th Cir. 1979). To claim invasion of privacy, the plaintiff must have conducted herself in a manner consistent with an actual expectation of privacy. *Hill v. Nat'l Collegiate Athletic Ass'n.*, 7 Cal. 4th at 26. Since a person in public knows that they can be viewed or filmed, then they cannot believe that to be a private space. Hence, they have waived their privacy. Josh Blackman, *Omniveillance, Google, Privacy In Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 351 (2009).

²⁰⁹ Of course, having volunteered to be on the show, the participant has solidly demonstrated her consent.

²¹⁰ This does not change simply because money changes hands. Money might indicate a contract, akin to a personal appearance fee. Alternatively, it might be in exchange for access to the participant's life or use of their image, thereby foreclosing future claims that a participant's privacy was violated or his image misappropriated. This does not mean that the contract is an employment relationship. If anything, it demonstrates the participant's control and embodiment of an independent businessperson selling a product.

²¹¹ RESTATEMENT (SECOND) OF TORTS § 652C (1977) (explaining that the mere publication of a person's photo in a magazine does not amount to misappropriation); *Castro v. NYT Television*, 370 A.2d 88, 99 (N.J. Super. Ct. App. Div. 2004); *see also* *Ruffin-Steinback v. DePasse*, 82 F. Supp. 2d 723, 730-31 (E.D. Mich. 2000); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995) (describing celebrity's right to publicity and economic value in his or her image).

²¹² *See, e.g., Lane v. MRA Holdings, Inc.*, 242 F. Supp. 2d 1205, 1209-10 (M.D. Fla. 2002); *Candelaria v. Spurlock*, No. 08 Civ. 1830, 2008 U.S. Dist. LEXIS 51595 (E.D.N.Y. July 3, 2008) (applying N.Y. Civ. Rights Law § 51); *Greenstein v. Greif Co.*, No. B200962, 2009 WL 117368 (Cal. App. Dep't Super. Ct. Jan. 20, 2009); *Castro*, 370 A.2d at 99

In one case, a seventeen-year old girl was driving down the street when a man with a video camera asked her to flash her breasts for the camera.²¹³ He assured her that the film was for his personal use, and did not mention that it would be sold as an entertainment product.²¹⁴ She agreed and flashed. This footage was later edited and included in a *Girls Gone Wild* video; the girl then sued for misappropriation. The court explained that misappropriation forbids a business from using a private individual's image to advertise or promote a product, but it does not forbid a business from using the image in a product.²¹⁵ Consequently, inclusion in the video was not misappropriation.²¹⁶ Similarly, patients filmed in a hospital emergency room could not claim misappropriation although the footage was included in a TLC reality television show.²¹⁷ The court reasoned that because the patients were not used to advertise a product or business, the use was not commercial.²¹⁸ In another case, a woman who worked at McDonald's sued Morgan Spurlock because he filmed her with a hidden camera and included that footage in his documentary *Super Size Me*.²¹⁹ The court dismissed her claims, reasoning that because she was in public, she could be filmed, and because she could be filmed, the footage could be used in the documentary.²²⁰

E. Control Over the Activity

Whereas employment is predicated on an employer's control of an employee and determining what, how, when, and for what purpose he will do something,²²¹ reality TV is predicated on allowing participants to do what they want. Once the cameras start rolling, the majority of

(discussing emergency room patients filmed for TLC reality show); *Ettore v. Philco Television Broad. Corp.*, 126 F. Supp. 143, 145 (E.D. Pa. 1954) (discussing how boxer appearing in boxing match was televised).

²¹³ *Lane v. MRA Holdings, Inc.*, 242 F. Supp. 2d 1205, 1209-10 (M.D. Fla. 2002).

²¹⁴ *Id.* at 1210.

²¹⁵ A film or DVD is not in and of itself a "commercial purpose." *Id.* at 1214; *Tyne v. Time Warner Ent. Co.*, 204 F. Supp. 2d 1338, 1339 (M.D. Fla. 2002); *Castro*, 370 A.2d at 297-98.

²¹⁶ *Lane*, 242 F. Supp. 2d at 1212-14.

²¹⁷ *Castro*, 370 A.2d at 91, 97-98.

²¹⁸ *Id.* at 97.

²¹⁹ *Candelaria v. Spurlock*, No. 08 Civ. 1830, 2008 U.S. Dist. LEXIS 51595 (E.D.N.Y. July 3, 2008) (applying N.Y. Civ. Rights Law § 51).

²²⁰ The woman was working at McDonald's, when Spurlock asked her for nutritional information. *2-3.

²²¹ *See Herman v. RSR Servs.*, 172 F.3d 132,140 (2d Cir. 1999) (explaining an employer's control of employee's activities during work-time).

activities undertaken by a participant are neither controlled nor demanded by the TV show.²²²

Indeed, by virtue of allowing himself to be filmed, the participant reveals his power and control over the situation. This was exemplified in a case involving *Gene Simmons Family Jewels*, a reality program about the life of Gene Simmons.²²³ In response to a request from the show, Steven Greenstein, a businessman in New Orleans, arranged for Simmons to be the Grand Marshal of the Mardi Gras Parade. While Simmons was in New Orleans, Greenstein escorted him to several events and appearances, resulting in many on-camera interactions between the men. Greenstein knew he was being filmed for the show. He even wore a microphone to record his voice, and reviewed the raw footage after each day.²²⁴ Producers later asked Greenstein to sign a release to use that footage, but he refused to do so unless he was paid (Greenstein mistakenly believed that *Family Jewels* could not use the footage including him unless he either consented in writing or was compensated).

When *Family Jewels* broadcast the episode without paying him or obtaining a written release,²²⁵ Greenstein sued for misappropriation,²²⁶ claiming that his image had been used without his consent.²²⁷ The court dismissed his claims.²²⁸ It stressed that Greenstein had voluntarily and knowingly been filmed for the episode and even helped.²²⁹ Therefore, because he chose to participate and consented to

²²² WRIGHT, *supra* note 1, at 8 (participant reporting that film crew refused to interact with participants). Even within an acknowledged employment relationship, if an on-call worker is free to engage in personal activities, such as socializing, watching television, exercising, or running errands, during waiting times, that time does not qualify as compensable work time. *See, e.g.*, *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 676 (5th Cir. 1991); *Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F.2d 347, 351-52 (9th Cir. 1992). Consequently, assuming *arguendo* that appearing on reality television constituted employment, the myriad activities in which that participants engage – for their own purposes or choice – would not constitute work time. Once these are eliminated, there is nothing left.

²²³ *Greenstein v. Greif Co.*, No. B200962, 2009 WL 117368 (Cal. App. Dep't Super. Ct. Jan. 20, 2009).

²²⁴ *Id.* at *2.

²²⁵ *Id.* at *2.

²²⁶ *Id.* at *2, *6. He sued for misappropriation, which required him to prove that (1) *Family Jewels* used his identity; (2) the use was for *Jewels*'s advantage, commercially or otherwise; (3) he did not consent; and (4) he was injured. *Greenstein*, 2009 WL 117368, at *8; *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 322, n.1 (1997).

²²⁷ *Greenstein*, 2009 WL 117368, at *8.

²²⁸ *Id.* at *7, 9 (upholding dismissal of claim on merits).

²²⁹ *Id.* at *7-9. Greenstein himself prepared a sign to be held up during filming that read: "Gene Simmons Reality TV Show" (working title) ("program") is being videotaped in this

filming, he could not now complain.²³⁰

F. Producer Control of the Environment and the Impact of the Camera

Admittedly, a reality television program controls several aspects of the production, and some of these can impact the actions of participants. One aspect pertains to the show's constructed environment; specifically, any producer-created situations that encourage participants to behave in a certain way. Another pertains to the presence of cameras, and the possibility that participants might alter their behaviors in response to the camera. In fact, critics complain that due to the editing, producer-created situations, and participants playing to the cameras,²³¹ "reality" TV is not real.²³²

With regard to the first point, the television show may brief participants about the focus of a day's filming, run through blocking, or ask them to repeat a comment.²³³ It may construct living circumstances²³⁴ or create contests for participants, thereby setting the stage for certain events to play out.²³⁵ Nevertheless, a participant can choose to play along or refuse.²³⁶ Additionally, even if she does, she still chooses how to behave and sets her own limits. Moreover,

location for possible network broadcast. If you are in this area, you may be photographed. Your presence in this area shall be deemed consent to photograph you, to record your voice, and to exploit such image, photographs and sound recordings in this program and other programs in all media, worldwide, in perpetuity." *Id.* at *2.

²³⁰ *Id.* at *6, *9.

²³¹ Many commentators and academics believe that the participant's knowledge of the cameras alters their "self" on the show. BIRESSI & NUNN, *supra* note 1, at 19; HILL, *supra* note 1, at 38.

²³² See HILL, *supra* note 1, at 70-72, 175-78; Miller, *supra* note 12, at 189; WRIGHT, *supra* note 1, at 1, 7. Notwithstanding, neither the program's authenticity, nor its behind-the-scenes production determines whether a participant's activity qualifies as work.

²³³ Ingela Ratledge, *Is It Just Me? Or Did The Reality Show Conveyor Belt Of Love Seem Scripted?* TV GUIDE MAG., Jan. 18-24, 2010, at 13. *Survivor's* first champion Richard Hatch claimed that producers sometimes re-staged encounters, such as when Hatch caught a shark, the film crew asked him to do it a second time. *United States v. Hatch*, 514 F.3d 145, 153 (1st Cir. 2008).

²³⁴ Miller, *supra* note 12, at 187-88 (discussing how *The Real World* and *Survivor* exemplify shows where producers create special living arrangements and design the format of the show).

²³⁵ In fact, crews sometimes follow a shooting outline to collect specific events due to their potential to contribute to a storyline. Miller, *supra* note 12, at 201.

²³⁶ On *Survivor*, for instance, participants make their own choices (switch alliances, lie, and loaf). Individuals on *The Biggest Loser* can choose to eat healthy or fail to complete a workout; and married parents in a show premised on raising a flock of children might divorce or become so annoying and self-absorbed as to repel viewers. For a detailing of these instances of participant-controlled behavior, artifice, and scheming, see WRIGHT, *supra* note 1, at 27-33, 37-8, 47-49.

despite any strategic planning or diminished authenticity, reality programs remain unscripted.²³⁷ Participants, be they adults or children, are not required to learn and recite lines, dance choreographed numbers, or conform their language or actions to the whims of a director. To the contrary, the crew and television show are subject to the whims of the participants.²³⁸

With regard to a participant's response to the cameras, although acting or performing in a television production may qualify as work,²³⁹ being caught on camera does not amount to acting. In any event, that a participant plays to the cameras, acts differently, or attempts to present a certain image²⁴⁰ underscores their choice in and control over the situation. Indeed, the show is restricted, if not held hostage to, the participant's choice.

G. Purpose and Benefit of the Activity

Although the end-product of a reality television show can be traced back to the participants, as they allowed themselves to be filmed and the resulting footage is then used in the final product, simply providing something valuable or beneficial is not the test of "employment."

The participant's consent to be filmed enables the television show to harvest raw materials, i.e., the tangible film footage. That footage is then used by writers and editors to create the end-product of the television program. Enabling the television program to harvest raw materials for the show, however, is not equivalent to making that product or working for the show. This would conflate the waiver of the privacy right with both the television product and the work involved in making it.

To the contrary, this illustrates the participant's independence, and she is simply providing raw materials. This is analogous to any individual who possesses a resource. For example, a farmer who owns

²³⁷ BIGNELL, *supra* note 1, at 61; BIRESSI & NUNN, *supra* note 1, at 2-3; Tiffany, *supra* note 23.

²³⁸ As the Producer of *Conveyor Belt of Love* explained, "we got one shot at capturing [the participants'] reaction." Ratledge, *supra* note 174.

²³⁹ See *Metro-Goldwyn-Mayer Studios*, 189 Cal. Rptr. at 20.

²⁴⁰ HILL, *supra* note 1, at 67-68. Research suggests that participants sometimes "perform" for or act differently when aware of a camera: A German study analyzing the impact of government surveillance on behavior found that "[p]eople under surveillance behave differently than people who are not monitored--differently than free people." Kreativrauschen, [http:// www.kreativrauschen.com/blog/2008/06/04/data-retention-effectively-changes-the-behavior-of-citizens-in-germany/](http://www.kreativrauschen.com/blog/2008/06/04/data-retention-effectively-changes-the-behavior-of-citizens-in-germany/) (June 2008).

an apple orchard can choose to keep the fruit or allow an applesauce company to enter her orchard and harvest the fruit. The farmer's act provides access to the raw material of the apples, but the company picks the fruit, decides what to make with it, adds ingredients, and processes it into the final product of applesauce. Therefore, allowing access to the orchard does not transform the farmer into an employee of the applesauce company, or mean that she worked as part of the applesauce-making enterprise. On the contrary, her possession, control over, and consent to access the raw materials of the apples designate her independence.

The reality participant is like the farmer: she allows the television program to access the fruit of her daily experiences; the television program harvests this by filming those experiences and makes them into the end-product of the television program. Just as the farmer is not an employee of the applesauce company and did not become one by virtue of allowing the harvest of the apples, neither is the reality participant.

Furthermore, even where work is involved, employment does not include instances where a person works for his or her own advantage.²⁴¹ The activity of being filmed, or consent to access and broadcast, cannot be said to be "pursued necessarily and primarily for" the benefit of the show,²⁴² as opposed to for the benefit of the participant (or of the participant's parents). The participants do not work *for* the television show, as much as they participate for their own interest,²⁴³ whether it is for the experience, fame,²⁴⁴ or a springboard to some other opportunity.²⁴⁵ In fact, an uncooperative, boring, or criminal participant may actually hamper the television product and its ratings: "Nothing ruins an unscripted TV show faster than a participant who is clearly playing to the cameras, preoccupied with how his or her 'character' will be perceived while dreaming about parlaying an

²⁴¹ *Walling*, 330 U.S. at 152.

²⁴² *Greenberg*, *supra* note 6, at 608.

²⁴³ Applicants state that they believe participating in a reality television program will be a great experience, broaden their world view, and increase their self-understanding. BIRESSI & NUNN, *supra* note 1, at 27. Even Snookie of MTV's *Jersey Shore* explained that because of the show, "I'm a better person [now]." MTV broadcast, Jan. 21, 2010. Individuals appearing on VH1's *Celebrity Rehab* (2008) obtain treatment for various levels of drug and alcohol addictions. *Extreme Makeover: Home Edition* (ABC – 2004) builds a new house for a family each week.

²⁴⁴ Tiffany, *supra* note 23, at 15; BIRESSI & NUNN, *supra* note 1, at 144-45, 147.

²⁴⁵ CUMMINS & GORDON, *supra* note 1, at 41; BIRESSI & NUNN, *supra* note 1, at 144-45; see PEOPLE, *Legal Matters*, at 165 (describing Jon Gosselin's countersuit claiming that TLC prevented him from pursuing other media opportunities).

‘Omarosa moment’ into an extended lease on those 15 minutes of fame.”²⁴⁶ Where the participant is in control or involved in the program to pursue their own goals, it better indicates an independent contractor or person working on their own behalf.

H. The Shirley Temple Exemption and Reality TV

Assuming *arguendo* that a child’s participation in or appearance on a reality TV program is work or part of an employment relationship,²⁴⁷ the FLSA still does not apply. If the child’s activity constitutes work, it is because the child is deemed to be performing for, under the direction of, and in a television production. Pursuant to the Shirley Temple Act, however, the FLSA’s child labor prohibition does not apply to a child employed as an actor or performer in a television production.²⁴⁸ Therefore, the elements that would bring the child’s reality TV participation within the ambit of the FLSA (i.e., those that would render it “work”) are the very elements that would exempt the situation from the child labor prohibition.²⁴⁹ Consequently, either the FLSA does not cover children appearing on reality TV because their participation is not equivalent to work or does not take place within what is understood to be an employment relationship (i.e., the activity is not covered); or, the FLSA does not cover children appearing on reality TV because they qualify as children performing in a television production who are exempt from the FLSA’s child labor prohibitions (i.e., the type of work is exempt from coverage).

Aside from the FLSA, state statutes also cover child employment. Their value with regard to children on reality shows, however, is negligible.²⁵⁰ Where such statutes exist, they typically include exemptions for child actors and entertainers. Thus, like the FLSA, they do not prohibit children from performing. Rather, they

²⁴⁶ Lowry, *supra* note 25. Chad Gervich, *Casting More Complicated for “Swap,”* DAILY VARIETY, Mar. 12, 2009; Shari Francis, *Casting Type A’s Makes Show Click,* Mar. 18, 2008, DAILY VARIETY (casting *Apprentice*).

²⁴⁷ This presumes that the participation of a child in a reality TV program would amount to the production of goods for commerce. The child labor provisions require commerce, *see* 29 C.F.R. § 570.103 (2010).

²⁴⁸ 29 U.S.C.A. § 213(c)(3) (2010).

²⁴⁹ Stated another way: 29 U.S.C.A. § 213(3)(c) exempts children who perform in a television production. If participating on reality television is equivalent to performing in a television production, then the child is exempt because it is performing in a television production.

²⁵⁰ State child labor laws are not within the scope of this article, but are mentioned to underscore that labor law is not an effective solution to the reality child situation.

exempt them from broader child labor rules, impose requirements regarding work permits, a child actor's schooling, hours that can be worked,²⁵¹ and sometimes establish trusts for money earned.²⁵² Contrary to popular belief, child actor laws were not enacted to protect children from employers, but to give an employer some protection against a minor disaffirming a contract.²⁵³ The mechanism by which this contractual assurance is achieved²⁵⁴ usually requires court approval of the contract. This approval process then triggers any statutory requirements mandating oversight of the child's welfare or earnings.²⁵⁵ As a result, a parent remains able to waive her child's rights, consent on behalf of the child, and subject the child to her poor judgment. Therefore, as applied to children on reality television, these state statutes would do little to protect a child.

²⁵¹ Several states, including California, Florida, Massachusetts, and New York, have enacted minors entertainer contract statutes. See CA. Fam. Code §§ 6750-53 (1994); FL. Stat. 743.08-.095 (1997); MASS. GEN. LAWS ANN. ch. 231, § 85P1/2 (1997); N.Y. Arts. & Cult. Aff. Law § 35.03 (McKinney 1997); see also Warner Bros. Pictures, Inc. v. Brodel, 192 P.2d 949, 953 (Cal. 1948) (regarding California statute); Thom Hardin, *Note: The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur?*, 19 J. JUV. L. 376 (1998).

²⁵² These range from requiring work permits or filming parental consent: Alabama, Alaska, Arkansas, Connecticut, Delaware, Georgia, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Oregon, Vermont, Virginia; those limiting the hours worked or requiring that schooling be ensured: Hawaii, Illinois, Iowa, Massachusetts, New Jersey; and more detailed and complex statutes, such as Indiana, Texas, including additional requirements that a portion of earnings placed in trust California, Florida, New York, North Carolina, Pennsylvania. Idaho (Sec. 44-1306) prohibits employment of child entertainers, with some exceptions. Office of Performance, Budget, and Departmental Liaison, Wage and Hour Division, Employment Standards Administration, *Child Entertainment Laws As of February 23, 2009*, http://www/state_by_state_CHILD_Regs.mht.

²⁵³ Under the infancy law doctrine, minors may disaffirm their contracts. Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Infancy to Accountability*, 21 OHIO N.U. L. REV. 481, 486 (1994); see also 42 AM. JUR. 2D CONTRACTS AND CONVEYANCES 58 (1969). Notwithstanding, the entertainment industry, having weighed this risk against the potential benefits, continues to contract with minors. Hardin, *supra* note 240, at 376. See Staenberg & Stuart, *supra* note 49 ("The limited body of case law on the subject suggests that the Coogan law provided far more protection to film makers than to child actors").

²⁵⁴ When the court approves the contract, the minor cannot disaffirm it. Hardin, *supra* note 250, at 378.

²⁵⁵ During the contract approval process, the court considers whether a contract is fair and reasonable. Hardin, *supra* note 250, at 379. See Cal. Fam. Code § 6751(b); Fla. Stat. Ann. 743.08(3)(a); MASS. GEN. LAWS ANN. ch. 231, 85P(c), and usually protects some a portion of a minor's contract earnings. Erika D. Munro, *Under Age, Under Contract, and Under Protected: An Overview of the Administration and Regulation of Contracts with Minors in the Entertainment Industry in New York and California*, 20 COLUM.-VLA J.L. & ARTS 553, 554 (1996); Hardin, *supra* note 250, at 379; Seigel, *supra* note 3, at 434-37; see also Cal. Fam. Code § 6752; MASS. GEN. LAWS ANN. ch. 231, 85P(d)(2); N.Y. Arts & Cult. Aff. Law 35.03.3(b).

I. Exploiting a Child is Not Equivalent to Employing a Child

For the reasons explained above, the FLSA's prohibition against oppressive child labor does not apply to children appearing on reality television programs. But even in the absence of the legal analysis that compels this conclusion, the FLSA and labor law should not be manipulated or relied on to protect children in these situations. Doing so mis-frames the issue and diverts attention from the true duties and responsibilities involved.

When the concerns about children on reality television are boiled down to their essence, the issue is not that children are forced to perform dangerous jobs while being denied the wage and hour protections of the FLSA. Instead, it is that these children have been stripped of their privacy and put into situations that may harm their emotional well-being, and that the type of parents who put their children in such situations may not adequately protect their children's interests. This is not an issue best addressed by labor law, but perhaps by child welfare laws.²⁵⁶

Nonetheless, the threshold issue of whether an activity (such as appearing on reality television) amounts to work, the age of the purported worker is irrelevant. The worker's age comes into play only once the activity has been found to constitute work and an employment relationship has been established. Only thereafter is the age of the child relevant in determining whether the activity at issue constitutes oppressive child labor. In other words, while we may think it is wrong for a parent to subject a child to around-the-clock filming and permit television broadcast, the parent's choice to do so, however ill-advised, does not transform the underlying activity into work or the child into an employee.

In any event, the reality television program did not put the child into this potentially exploitative situation. The parent did.²⁵⁷ The television show merely accepted the parent's invitation to enter the otherwise private space and record the otherwise private situation. Courts have held that when a parent allows the media to exploit his or her child, the media has committed no wrong.²⁵⁸ Generally, a court will not substitute its judgment for that of a parent, even when the parent's

²⁵⁶ For instance, 42 U.S.C.A. § 5106g defines abuse as "that which results in serious physical or emotional harm, sexual, or exploitation of a child." This provision seems more appropriate to the situation than do the child labor provisions.

²⁵⁷ See *Faloon v. Hustler*, 607 F. Supp 1341 (D.C. Tex. 1985).

²⁵⁸ *Id.* See also *Shields v. Gross*, 448 N.E.2d 108, 112 (N.Y. 1983).

choices are ill-advised and motives are questionable.²⁵⁹

For instance, in *Shields v. Gross*,²⁶⁰ the mother of an underage model/actress allowed a magazine to use nude photos of her daughter. The daughter later sued the magazine. Because the parent consented on behalf of the child and waived her privacy, however, the child had no remedy, and the media had done nothing wrong.²⁶¹ In fact, the court noted that the “obvious remedy” in such a situation was for a parent to not waive the child’s privacy in the first place. In another case, a mother gave permission for nude photos of her children to be published in various print media.²⁶² When *Hustler* used the photos in conjunction with an article on “Children, Sex, and Society,” the children sued.²⁶³ They asserted that, regardless of the mother’s grant of rights, the magazine was legally obligated to obtain judicial approval before using the photos.²⁶⁴ The court disagreed. It held that the mother’s permission to use the photos was binding, notwithstanding the children’s present objections.²⁶⁵ Indeed, barring some independent criminal act or child welfare obligation, a court will not shift responsibility for the child to a third party.²⁶⁶

V. CONCLUSION

Being filmed by a reality television show does not constitute work, and a parent’s decision to put his or her child on reality television does not transform the child into an employee. Therefore, the FLSA does not apply, and its child labor provisions cannot rescue these children from the misguided choices of their parents. Moreover, even if reality show participation were considered work, these children would be exempt from the child labor provisions as performers in a television production.

This does not mean that participating on reality television is good for a child, or that no legal right of value or contractual exchange is involved. Rather, it means that, as in *Shields* and *Faloona*, the duty to protect the child and the blame for failing to do so lies not with labor

²⁵⁹ *Faloona*, 607 F. Supp. at 1360; *Shields*, 448 N.E.2d at 112.

²⁶⁰ *Shields*, 448 N.E.2d at 112.

²⁶¹ *Id.*

²⁶² *Faloona*, 607 F. Supp. at 1343-44.

²⁶³ *Id.* at 1343-45, 1350-51.

²⁶⁴ *Id.* at 1346.

²⁶⁵ *Id.* at 1351, 1353-55.

²⁶⁶ *Id.* at 1360; *Shields*, 448 N.E.2d at 112.

law or the media, but with the parent. To the extent that we focus on the child labor implications of reality television as a means of preventing child exploitation, we divert the focus away from reality television parents, enabling them to avoid responsibility and risk the welfare of their children.