

REALITY'S KIDS: ARE CHILDREN WHO PARTICIPATE ON REALITY TELEVISION SHOWS COVERED UNDER THE FAIR LABOR STANDARDS ACT?

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I. INTRODUCTION

On September 19, 2007, CBS premiered a controversial primetime reality television program entitled *Kid Nation*. Premised on the slogan “40 Kids, 40 Days, No Adults,” the show hired forty children, ages eight to fifteen, and put them in a ghost-town-turned-movie-set in Bonanza City, New Mexico for forty days. The purpose of this filmed social experiment was to see the type of “nation” these children would establish in an adult-free world. The children worked hard to create and run their new society. Some of the work included hauling wagons, managing fabricated businesses, cooking meals, and cleaning outhouses, and it occupied up to fourteen hours of the children’s days.¹

Show creator Tom Forman attests that the kids “were in good hands and were under good care with procedures and safety structures that arguably rival or surpass any school or camp in the country.”² But several injuries, though minor, ensued, including three children who accidentally drank bleach and one who burned her face while cooking.³ Yet even if their

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1. Maureen Ryan, *What Were ‘Kid Nation’ Parents Thinking?*, CHI. TRIB., Sept. 4, 2007, at 12.
2. Rob Woollard, *‘Lord of the Flies’ Reality Television Show Triggers Outrage*, MSN (Singapore), Aug. 29, 2007, <http://news.sg.msn.com/Entertainment/article.aspx?cp-documentid=171803>.
3. Edward Wyatt, *‘Kid Nation’ Slips in Viewers but Gains in Advertisers*, N.Y. TIMES, Oct. 8,

on-set youthful mishaps had resulted in more serious consequences—contracting HIV or death, for instance—per the terms of a participation agreement, then CBS and the show’s producers would not have been liable.⁴

Before *Kid Nation* ever aired, the mere thought of a *Lord of the Flies*-style reality television program sparked a flurry of criticism in the news media. The fact that the children missed weeks of school also drew the vocal ire of children’s rights advocates. Critics bemoaned unfair contractual arrangements; long work hours; lack of on-set tutors; inadequate safety precautions; and the public exploitation of unsuspecting adolescents. Most of the legal ruckus centered on potentially illegal work conditions, and inquiries into whether CBS and *Kid Nation* producer Good TV⁵ (collectively, the “Producers”) evaded New Mexico child labor laws were particularly commonplace in the months leading up to the show’s premiere. In response to accusations of child labor violations, the Producers simply said that the children were not working. Rather, the Producers contended, the children enjoyed an experience analogous to summer camp.⁶ The Producers argued in the alternative that even if the children were working, they were not employees, but rather independent contractors who were not regulable under state or federal child labor provisions.⁷

The Producers’ argument illustrates that the practice of branding workers with the independent-contractor label in an attempt to avoid an employee-employer relationship, an age-old practice in the labor market,⁸ has crept into Hollywood’s newest cash cow: reality television.⁹ Whichever

2007, at C3. The mother of the twelve-year-old girl who suffered burns on her face complained to New Mexico officials, alleging child abuse and neglect. The county sheriff, however, reported that he had found no criminal misconduct related to the show. Maria Elena Fernandez, *‘Kid Nation’ Labor Law Dispute Intensifies*, L.A. TIMES, Aug. 22, 2007, at A11.

4. Participation Agreement for *Kid Nation*, at 18 (Dec. 4, 2006), <http://www.thesmokinggun.com/archive/years/2007/0823071kidnation1.html> [hereinafter Participation Agreement]. One attention-grabbing clause states: “I understand that if the Minor chooses to enter into an intimate relationship . . . the Minor and I [the Minor’s guardian] hereby assume any and all risks that may be associated . . . including, without limitation . . . sexually transmitted diseases, HIV, and pregnancy, if applicable. . . . I hereby release . . . all claims associated therewith.” *Id.*

5. Good TV, Inc., is owned by Tom Forman, the creator of *Kid Nation*. Maria Elena Fernandez, *‘Kid Nation’ Puts Hollywood Labor Tension into Sharp Focus*, L.A. TIMES, Aug. 29, 2007, at A1.

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

7. See Scott Collins, *Kids in Reality TV’s Tender Care*, L.A. TIMES, Aug. 27, 2007, at E1.

8. See Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 988 (1999).

9. Another argument advanced by entertainment industry employers hoping to avoid labor regulation is that participation on a reality program does not constitute work.

label reality show participants actually deserve (an issue discussed later in this Note), this new genre of television has produced a class of people whose legal rights have yet to be clearly defined.¹⁰

Reality television producers do not generally treat participants on their programs as employees. Moreover, participants are almost never represented by the Screen Actors Guild (“SAG”) or the American Federation of Television and Radio Artists (“AFTRA”), the two Hollywood unions representing television actors and performers, respectively. Reality participants thus often find themselves in a legal grey area within which they are doubly unprotected: denied employee status by producers and denied membership in the unions.¹¹ Participants are consequently placed at a significant disadvantage relative to producers who typically mandate participation agreements under which participants sign away a host of rights.¹² Their ability to negotiate the terms of these agreements is practically extinguished by the “literally thousands of people behind them waiting for their 15 minutes.”¹³

When *Kid Nation* finally aired, the critics’ fears of rampant starvation, abuse, and chaos did not pan out. Instead, they were introduced to forty affable children, almost all of whom jubilantly went about their daily activities on the show. The ostensible harmlessness may have tempered the journalists’ hypercriticisms, but from a legal standpoint, many questions about state labor violations remained unanswered. And still, one question remained curiously unasked: Did *Kid Nation* Producers violate *federal* child labor law?

State law has traditionally regulated the employment of minors on television. These children are also represented by the Hollywood unions whose protection typically surpasses the protection afforded by state laws. Because children who participate on reality television are typically not

10. Kelley Tiffany, *Reality Show Participants: Employees or Independent Contractors?*, 32 EMP. REL. L.J. 15, 16 (2006).

11. Legal grey areas pervade reality television. Copyrights of reality show formats and the employment status of reality show “writers” are two recent areas of contention. See Alexis Miller, Comment, *Reality Check for Production Companies: Why Writers on Reality Television Are Entitled to Overtime Pay*, 27 LOY. L.A. ENT. L. REV. 185 (2007); J. Matthew Sharp, Note, *The Reality of Reality Television: Understanding the Unique Nature of the Reality Genre in Copyright Infringement Cases*, 8 VAND. J. ENT. & TECH. L. 177 (2005).

12. See Tiffany, *supra* note 10, at 17. See also *Higgins v. Superior Court*, 45 Cal. Rptr. 3d 293, 303 (Ct. App. 2006) (holding that “[t]here is no serious doubt that the television defendants had far more bargaining power than petitioners [and] . . . the Agreement was presented to petitioners on a take-it-or-leave-it basis”).

13. MARK ANDREJEVIC, REALITY TV: THE WORK OF BEING WATCHED 11 (2004) (quoting Lee Bailey, *For Reality Stars, the Reality of a One-Time Payment*, N.Y. TIMES, Dec. 16, 2001, at 33).

represented by the unions, these minors have been relying on state law—usually the state in which the show is filmed—to determine their rights. But with their mobility and legal savvy, producers are able to advantageously film reality shows in states with lax child labor laws.¹⁴ Such a tactic might be good for the producers' bottom line, but is inconsistent with the best interests of the children on their shows. The *Kid Nation* Producers opted to film in New Mexico, a state known to have lax child labor laws.¹⁵ In fact, the state did not have any statutes regulating minors on television until after the *Kid Nation* cast vacated Bonanza City.¹⁶

Since reliance on state law might not serve the best interests of children on reality television, the time is ripe to challenge the assumption that their participation is governed exclusively by state law by exploring whether they might alternatively qualify for federal protection. Since 1938, the federal government, under the authority of the Fair Labor Standards Act ("FLSA"), has regulated the employment of children engaged in interstate commerce. The FLSA explicitly excludes some forms of child labor from its reach, including a provision that exempts children "employed as . . . actor[s] or performer[s]."¹⁷ Consideration of the FLSA has likely been left out of the *Kid Nation* discussion for one primary reason: an assumption that this exemption applies to those whom this Note has dubbed "reality children"—children who participate in reality television programs.¹⁸ In light of what has been learned about *Kid Nation*, and about reality television in general, that assumption should now be reconsidered. This Note examines the actors or performers exemption, concluding that on certain reality shows such as *Kid Nation*, reality children are not exempt.

But before considering that exemption, two issues must be addressed. First, does participation on a reality show constitute work? And second,

14. Forman avoided choosing children from California and New York, which have comprehensive and protective laws governing children in the entertainment industry. "[A]s we looked at the labor issues [in California and New York], there were some issues there," he said. Fernandez, *supra* note 5.

15. See Collins, *supra* note 7.

16. Polly Summar, *New Law Protects Young Actors: Measure Keeps Entertainment Industry from Working N.M. Kids Too Hard*, ALBUQUERQUE J., July 18, 2007, at A1.

17. 29 U.S.C. § 213(c)(3) (2000).

18. The following statement by a University of Pennsylvania law student is consistent with the assumption that *all* children on television are exempt: "[T]here is a glaring hole in the federal laws and regulations pertaining to employment of minors. Children working in the entertainment industry are exempt from the Fair Labor Standards Act." Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 429 (2004). See also Collins, *supra* note 7 ("Federal child-labor laws may not apply [to *Kid Nation*], because Hollywood has enjoyed an exemption for kid actors since the 1930s. 'Kid Nation' suggests it might be time to revisit that exemption now.").

even if it is work, are participants employees as contemplated by the FLSA? Ultimately, a finding that reality children are covered by the Act entitles them to the Act's various rights and protections, including limits on hours worked, minimum wages, overtime wages, and a prohibition on certain dangerous activities. These rights and protections cannot be contracted away in a participation agreement.¹⁹

Because *Kid Nation* was the first reality show to feature minors exclusively, it provides a fitting springboard from which to evaluate whether reality children in general are covered by the FLSA's child labor provisions. Although FLSA coverage must be determined on a case-by-case basis, a discussion of *Kid Nation*, and of reality television in general, will illuminate relevant characteristics of the genre and help guide future analysis of this issue. Given the untempered success and growth of reality television, it is unlikely that *Kid Nation* will be the last program to utilize the services of children. Again, a determination of FLSA coverage will hinge on three questions: (1) Are the children performing work?; (2) Are the children employees?; and (3) Are the children exempt as actors or performers?

Part II of this Note discusses the phenomenon that reality television has become by tracing its history, examining its current position in American culture, and considering its future role in the entertainment industry. Part III examines the FLSA's definition of work, its test to determine employment status, and its child labor provisions. Part IV uses facts from *Kid Nation*, with additional support from information about reality television in general, to evaluate whether the children on that show should be covered by the FLSA. This Note ultimately argues that the children on *Kid Nation*, and other reality children in similar circumstances, are regulable under the FLSA. Finally, Part V offers a brief and general guideline for how a court or litigant could apply the FLSA to reality television participation.

II. WHAT IS REALITY TELEVISION?

Reality television is a young but flourishing genre of television programming. In its most basic characterization, reality television features ordinary people (that is, nonactors) interacting in situations in which their dialogue is unscripted.²⁰ While the genre has decades-old roots in various

19. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985).

20. For a similar definition, see Tiffany, *supra* note 10, at 16 ("The characteristics of reality television include using average people over professional actors in an unscripted setting as the

factual programming formats, the term “reality television” entered American discourse only after CBS first aired *Survivor* in 2000.²¹ *Survivor* served as a catalyst for the modern-day reality television boom,²² and since 2000, reality-based programming has “flooded the airwaves.”²³ Although it has been condemned by some as evidence of the demise of respectable American culture,²⁴ reality television has immense audience appeal and has quickly become the darling of network executives. It has evolved from an apparent short-term fad²⁵ to an enduring staple of American popular culture. Even judges cannot deny its postmillennium cultural pervasiveness.²⁶

A. DEFINING REALITY

Given the amount and diversity of unscripted programs today, reality television is not an easily definable genre.²⁷ Anyone who has watched a reality show, however, will agree that the name reality television is often a misnomer because, while involving “real” people, most shows are set in highly contrived and controlled environments.²⁸ Mark Andrejevic, a reality television scholar, adds that “the increasingly contrived and sensationalistic premises of the shows . . . contribute to the debunking of any pretensions to

producers capture the drama of real life events unfolding in an often stressful and at times chaotic environment.”).

21. *Id.*

22. *Id.*

23. Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs “Illegal Contests” in Violation of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141, 143 (2007).

24. See, e.g., Tim Goodman, *The Reality Is This: Unscripted Shows Are Ratings Winners*, S.F. CHRON., Mar. 24, 2008, at E1.

25. David S. Escoffery, *Introduction to HOW REAL IS REALITY TV?: ESSAYS ON REPRESENTATION AND TRUTH* 1, 1 (David S. Escoffery ed., 2006).

26. See *Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108, 111 (Ct. App. 2002) (“Reality television and talk radio are two of the more popular cultural phenomena of the new century. In the first, real people often compete for a prize under the most unrealistic, often demeaning conditions.”).

27. Bethany Ogdon, *The Psycho-Economy of Reality Television in the “Tabloid Decade,”* in *HOW REAL IS REALITY TV?: ESSAYS ON REPRESENTATION AND TRUTH*, *supra* note 25, at 26, 29–30 (noting the difficulty in defining the genre because of its internal diversity). The diversity is evident in the various formats that fall under the umbrella of reality television. Some of these formats include: documentary-style shows (*An American Family*, *The Hills*, *The Real World*, *Kid Nation*, *COPS*, dating shows); makeover shows (*Extreme Makeover*, *Queer Eye for the Straight Guy*, *The Biggest Loser*); “celeb-reality” shows (*The Anna Nicole Show*, *The Osbournes*, *The Simple Life*, *The Surreal Life*); hidden-camera shows (*Cheaters*, *Punk’d*); competition or game shows (*Survivor*, *The Amazing Race*, *Fear Factor*); and talent-search shows (*American Idol*, *America’s Next Top Model*, *Last Comic Standing*, *The Apprentice*, *Dancing with the Stars*, *Project Runway*, *Top Chef*). Many programs can fall into several of these categories.

28. For a discussion of how the contrived environments relate to FLSA coverage, see *infra* Part IV.C.

'real' reality."²⁹ But he also believes that some of this real reality can be salvaged: "If . . . the scenarios they portray are, in many respects, contrived, what, then, constitutes the claim to 'reality' put forth by such shows? The answer appears to be twofold. First, the characters are not professional actors, and second, the show's action is unscripted."³⁰

B. REALITY'S HISTORY

According to some reality television connoisseurs, the genre was born in 1973 when PBS aired *An American Family*, a show documenting the day-to-day activities of an average American household.³¹ But the show widely recognized as the pioneer of modern-day reality programming is MTV's *The Real World*, which premiered in 1992.³² The show monitors the day-to-day interactions of several strangers living under one roof.³³ The genre first enjoyed widespread commercial success almost a decade later when the voyeuristic element of *The Real World* was placed in a game show context on CBS's *Survivor*.³⁴ "In the wake of *Survivor*'s runaway success, reality TV was rapidly transformed from a cheap form of niche programming to the hot programming trend of the new millennium, and eventually into a genre of its own."³⁵ Almost immediately after *Survivor*'s debut proved a great success, the genre enjoyed exponential growth.³⁶ A study from 2001 showed that 45 percent of Americans watch reality television.³⁷ Additionally, seven of the ten most-watched shows from the 2002–03 season were reality programs, and a then-record twenty-five unscripted series aired on broadcast networks during that season.³⁸

29. ANDREJEVIC, *supra* note 13, at 16. *See also* Sharp, *supra* note 11, at 193–94 ("The plot of a reality show is thus composed of the series of conflict creating devices weaved together by the creator to provide the maximum level of entertainment.").

30. ANDREJEVIC, *supra* note 13, at 102. *But see id.* at 3 (describing reality shows as staged spectacles "reliant on a cast of demicelebrities culled from the pool of would-be actors who do the rounds of the reality TV casting calls on the advice of their agents").

31. *Id.* at 66.

32. *See id.* at 71 (noting that unscripted programming lay largely dormant after *An American Family* until it was revitalized by *The Real World*).

33. At the writing of this Note, the twenty-first season of the *The Real World* was airing on MTV.

34. *See* ANDREJEVIC, *supra* note 13, at 195. *Survivor* chronicles the experiences of sixteen people competing for \$1 million while living as if stranded on a tropical island. *Id.*

35. *Id.* at 1–2.

36. According to a continually updated count on Wikipedia.org, since *An American Family* debuted in 1973, America has been graced by the presence of over 250 other reality shows. Reality Television, Wikipedia, http://en.wikipedia.org/wiki/Reality_television (last visited Feb. 28, 2009) [hereinafter Reality Television].

37. ANDREJEVIC, *supra* note 13, at 9.

38. Joel Michael Ugolini, *So You Want to Create the Next Survivor: What Legal Issues Networks*

C. REALITY TODAY

Reality television has blossomed into a dominant sector of the entertainment industry. The genre has grown so large that it now accounts for about 41 percent of all production activity in Hollywood.³⁹ Two primary reasons account for its continuing growth and success. First, the genre has gained wide audience appeal.⁴⁰ Several reality programs have enjoyed remarkable ratings success, often appearing at the top of weekly most-watched lists⁴¹ and “dominating the Top 20 listings of shows on television.”⁴² Certain reality gems like *American Idol*,⁴³ *Survivor*,⁴⁴ and *Dancing with the Stars*⁴⁵ regularly outperform top-scripted shows,⁴⁶ particularly in the coveted eighteen-to-forty-nine-year-old demographic.⁴⁷

The second key reason for the genre’s growth is its ease and low cost of production.⁴⁸ Reality programs can cost one-third of the production cost of scripted shows,⁴⁹ in part because participants are not represented by

Should Consider Before Producing a Reality Television Program, 4 VA. SPORTS & ENT. L.J. 68, 68 (2004).

39. Podlas, *supra* note 23, at 143. Although often considered second-rate entertainment, reality television has been legitimized by the Academy of Television Arts & Sciences through its creation of Emmy Awards for “Outstanding Reality-Competition” and “Outstanding Reality Program.” *Id.* at 144.

40. *See id.* at 147. Recognizing the broad popularity of the genre, Fox created a channel devoted exclusively to reality programming. Fox Reality Channel, <http://www.foxreality.com> (last visited Feb. 28, 2009).

41. *See* Steve Rogers, *Reality Ratings Roundup: ‘Talent’ and ‘Kitchen’ Top the Week’s Charts*, REALITYTVWORLD, June 20, 2007, <http://www.realitytvworld.com/news/reality-ratings-roundup-talent-and-kitchen-top-week-charts-5376.php>.

42. Goodman, *supra* note 24.

43. In fact, *American Idol* was the top-rated series on American television for the 2004–05, 2005–06, and 2006–07 seasons. Reality Television, *supra* note 36.

44. After being the most-watched show of the 2000–01 season, CBS’s reality pioneer *Survivor* has consistently been one of the most popular shows in America. Escoffery, *supra* note 25, at 1.

45. *See* Goodman, *supra* note 24.

46. In 2007, *American Idol* drew weekly audiences of thirty million on average, whereas popular scripted shows like *Grey’s Anatomy* and *CSI* attracted around twenty million viewers. Lacey Rose, *Reality Jumps the Shark*, FORBES, Feb. 5, 2008, http://www.forbes.com/2008/02/05/television-abc-nbc-biz-media-cx_lr_0205reality.html.

47. Podlas, *supra* note 23, at 147. In discussing the topic of this Note with peers, this author has recognized that even law school intellectuals are willing to admit their fondness for reality shows like *The Hills*, *Flavor of Love*, and *American Idol*.

48. *See id.* at 146 (“[I]n a programming environment where networks were eager to cut costs and increasingly reluctant to pour dollars into developing new shows, reality television seemed a godsend.”). Ben Silverman, cochairman of NBC Entertainment, has said that “CBS can fill three hours a week with ‘*Big Brother*’ for about five bucks.” Bill Carter, *Reality TV Is No Lightweight in the Battle to Outlast Strikers*, N.Y. TIMES, Jan. 14, 2008, at C4.

49. ANDREJEVIC, *supra* note 13, at 11. A scripted show on average costs about \$1 million to \$2 million to produce, whereas the typical reality show only costs about \$700,000. Miller, *supra* note 11, at 189–90.

unions and, if paid at all, earn far less than actors.⁵⁰ With an audience size comparable or superior to scripted shows and with significantly lower costs, reality television has proven to be a very profitable enterprise for networks.⁵¹

The events surrounding the writers' strike of 2007–08 further illuminate the genre's value. Since “writers” working on reality-based programs are not represented by the Writers Guild of America (“WGA”), the strike did not hinder the production of these programs.⁵² With new episodes of scripted shows running dry, networks flooded open time slots with unscripted programs—and audiences responded favorably.⁵³ In the absence of scripted dramas and comedies, reality shows mitigated the strike's financial impact on the industry and gave the writers less leverage in negotiations.⁵⁴

The genre has proven to be more than a mere fad. According to reality television scholar David Escoffery, “The variety and continuing popularity of reality-based programming . . . cannot be denied . . . [I]t is clear that unscripted shows will be a major part of television programming around the world for the foreseeable future.”⁵⁵

D. WHY CHILDREN?

The tests to determine whether an activity constitutes FLSA work⁵⁶ and whether a worker is an FLSA employee⁵⁷ are no different when dealing with child or adult laborers. Why, then, limit the scope of this Note to FLSA coverage of reality children? What distinguishes children in the reality television context? The answer is twofold.

The first reason concerns the voluntariness of participation. Adult

50. See Podlas, *supra* note 23, at 146–47.

51. See *id.* at 147–48. For convenience, this Note will refer to the stations that air reality programs as “networks.” It should be noted, however, that many cable stations air reality programs as well.

52. Barnes Brookes, *If Writers Go On Strike, Viewers Can Expect More Shots of Reality*, N.Y. TIMES, Oct. 20, 2007, at B7.

53. See *id.*

54. See Frazier Moore, *Lessons Viewers Learned from the Writers' Strike*, MSNBC, Feb. 24, 2008, <http://www.msnbc.msn.com/id/23168670>. In fact, jurisdiction of reality television writers was a key demand of the striking WGA. The union eventually withdrew its effort to bring reality writers under its umbrella after it was made clear the networks would not relinquish their best leveraging tool. See Posting of Brian Stelter to TV Decoder Blog, <http://tvdecoder.blogs.nytimes.com/2008/01/22/strike-writers-pull-reality-animation-off-the-table> (Jan. 22, 2008, 20:02 EST).

55. Escoffery, *supra* note 25, at 1–3.

56. See *infra* Part III.A.

57. See *infra* Part III.B.

participants consciously and purposefully place themselves in a spotlight on national television. They have knowledge (actual or constructive) of the risks and potential ramifications—both positive and negative—associated with their participation. It is no secret that being on a reality show can bring someone widespread fame,⁵⁸ but it also has the potential to tarnish reputations, relationships, and careers. A California appellate judge has said: “By having chosen to participate as a contestant [on *Who Wants to Marry a Multimillionaire*], plaintiff voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media.”⁵⁹ Adults sign participation agreements themselves, and unlike most children, they possess the wherewithal to fully comprehend the risks such participation entails and have the capability to fully consent to the participation.⁶⁰ Children, on the other hand, may be thrust involuntarily or unduly persuaded into participation by their parents, whose judgment may become clouded by the lure of fame and money. In contracting with producers, parents might not protect the child’s best interests, intentionally or not.⁶¹

Furthermore, children are less capable of censoring words and inhibiting actions that adults may recognize as inappropriate, embarrassing, or self-damaging.⁶² According to one critic of *Kid Nation*: “They are kids, for cripes’ sake—children!—who are still developing, still learning skills like self-control, still rather inexperienced at interpersonal conduct.”⁶³ Forman, the creator of *Kid Nation*, even noted that the kids on his show were “incredibly honest. If they’re sad, they cry. If they’re mad, they fight. It’s human beings at their best and human beings at their worst. They don’t

58. See Su Holmes, “When Will I Be Famous?” *Reappraising the Debate About Fame in Reality TV*, in *HOW REAL IS REALITY TV?: ESSAYS ON REPRESENTATION AND TRUTH*, *supra* note 25, at 7, 7. Some reality stars have also attempted to parlay their fame into careers in other forums. See, e.g., Katherine Rosman, *Selling Lauren Conrad*, WALL ST. J., Mar. 21, 2008, at W1 (describing the efforts of Lauren Conrad, star of reality program *The Hills*, to launch a career in fashion design).

59. *Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108, 115 (Ct. App. 2002) (emphasis added).

60. See Judith Duffy, *Regulators Urged to Protect Infants on Reality Shows*, SUNDAY HERALD (Scotland), Feb. 3, 2008, at 6 (“[I]nfants and children . . . can’t give their consent to something like this.”).

61. Krieg, *supra* note 18, at 429–32 (“Minors working as entertainers are frequently left without anyone to look out for them, and it is for this reason that the federal government needs to step in and take action.”).

62. See Posting of Diane Werts to TV Zone, <http://blogs.trb.com/entertainment/tv/blog> (July 18, 2007, 20:10 EST) (“[T]hey haven’t developed the internal mechanisms that tell an adult when to keep things private, or check a baser impulse, or forestall behavior that might injure/embarrass oneself or others.”).

63. *Id.*

cancel themselves.”⁶⁴ One girl was so honest that, prior to a prayer session, she announced, “I don’t want to be with Jewish people or atheist people, or anything like that.”⁶⁵ The naiveté of that statement embodies the risk of placing children on reality television; an adult may have realized the statement should have been censored. The potential ill effects to one’s reputation,⁶⁶ career, privacy,⁶⁷ physical safety,⁶⁸ and general well-being as a result of gaffes like that of the girl above are more avoidable when children are making them. An executive at the WGA echoed this idea: “To me, this is the sweat shop of the entertainment industry What’s happened with ‘Kid Nation’ is typical and universal, but then it’s that much worse because it’s about children.”⁶⁹

The second reason for this Note’s particular focus on reality children is the effect child labor can have on schooling opportunities. One of the stated purposes of the FLSA’s child labor provisions is to protect “opportunities for schooling of youthful workers.”⁷⁰ The FLSA protects these opportunities by allowing children to work only a specified number of hours per school day.⁷¹ Removing children from school for an extended period of time and placing them on a reality program may run counter to the Act’s educational purposes and could have deleterious effects on a child’s education.⁷² These education issues obviously have no relevance to adult reality participation. For these reasons, this Note focuses exclusively on the FLSA’s application to reality children.

64. *Id.*

65. Doug Elfman, *Stop Acting Like a Child!*, CHI. SUN-TIMES, Oct. 21, 2007, at D1.

66. It is widely understood that through crafty editing, producers can make reality participants appear in almost any light they please. See ANDREJEVIC, *supra* note 13, at 103.

67. The *Kid Nation* agreement explicitly states that “the Minor will have no privacy.” Participation Agreement, *supra* note 4, at 8.

68. One of the stated goals of the child labor provisions is to protect “the safety . . . of youthful workers.” 29 C.F.R. § 570.101 (2006). See also *Lenroot v. Interstate Bakeries Corp.*, 55 F. Supp. 234, 236 (W.D. Mo. 1944) (noting that one of the purposes of the child labor provisions is to “protect children against harmful labor”), *aff’d in part, rev’d in part*, 146 F.2d 325 (8th Cir. 1945). This notion of creating a safe work environment does not appear in the adult wage-hours provisions. Some reality shows place participants in risk of serious physical injury, so if new programs begin to place children in similarly risky situations, it provides greater reason to narrowly focus a FLSA inquiry on reality children.

69. Fernandez, *supra* note 5.

70. 29 C.F.R. § 570.101.

71. See *id.* § 570.119.

72. See Maria Elena Fernandez, *State Attorney Probing ‘Kid’ Show*, L.A. TIMES, Aug. 24, 2007, at E2.

III. THE FAIR LABOR STANDARDS ACT

On May 24, 1937, in the face of widespread low wages and severe unemployment,⁷³ President Franklin D. Roosevelt asked Congress to pass a new wage-hour law.⁷⁴ A year later, Congress enacted the Fair Labor Standards Act of 1938,⁷⁵ establishing a national minimum wage, overtime pay, and child labor standards for covered employees and employers.⁷⁶

In § 202 of the Act, Congress explicitly stated that its purpose in enacting such groundbreaking legislation was to correct and eliminate⁷⁷ “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”⁷⁸ Similarly, the Supreme Court has noted that many provisions in the FLSA “are remedial and humanitarian in purpose.”⁷⁹ Elaborating on Congress’s intent, the Court also stated that “the primary purpose of Congress [in enacting the FLSA] was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.”⁸⁰ Legislative history also supports the notion that, above all, Congress intended to aid and protect American workers.⁸¹ By prohibiting substandard labor conditions, the FLSA protects “the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.”⁸² Recognizing that the free market had failed to protect adequately these crucial rights,⁸³ Congress passed the FLSA, swiftly changing the landscape of employment relations across the country.

73. See LOUIS WEINER, *FEDERAL WAGE AND HOUR LAW* 14 (1977).

74. See Goldstein et al., *supra* note 8, at 1094 (citing FRANCES PERKINS, *THE ROOSEVELT I KNEW* 257 (1946)).

75. WEINER, *supra* note 73, at 15.

76. See *id.* at 7–8.

77. See 29 U.S.C. § 202(b) (2000).

78. *Id.* § 202(a).

79. *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

80. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509–10 (1950). While the Act’s primary purpose was to protect employees’ well-being—in regard to both their pocketbook and physical safety—the text of the FLSA also illustrates a second key purpose: to protect those employers who do not exploit substandard labor conditions. The Supreme Court has frequently recognized this protectionist purpose of the Act. See, e.g., *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987).

81. See *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945).

82. *Tenn. Coal*, 321 U.S. at 597. See also *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984) (“The argument here begins by pointing out that the FLSA was enacted to improve the living conditions, bargaining strength vis-a-vis [sic] employers, and general well-being of the American worker.” (citing 29 U.S.C. § 202)).

83. See Noelle M. Reese, Note, *Workfare Participants Deserve Employment Protections Under the Fair Labor Standards Act and Workers’ Compensation Laws*, 31 RUTGERS L.J. 873, 885 (2000).

The FLSA's dramatic impact on labor relations stems from the great breadth that the courts have afforded it. The Supreme Court in *Tennessee Coal, Iron & Railroad v. Muscoda Local No. 123* declared that "[s]uch a statute must not be interpreted or applied in a narrow, grudging manner."⁸⁴ The Court in *Roland Electrical Co. v. Walling* stated: "This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce . . . substandard labor conditions."⁸⁵

The following three FLSA issues are most pertinent to this Note: (1) how the federal courts have defined work under the FLSA; (2) how Congress defined employee in the Act and how the courts have interpreted that definition; and (3) how the FLSA regulates child labor.

A. WHAT CONSTITUTES WORK UNDER THE FLSA?

An activity must be considered work to qualify for coverage under the FLSA.⁸⁶ The Act, however, does not provide a definition, so defining this term has been left to the courts.⁸⁷ In 1944, the Supreme Court in *Tennessee Coal* offered the preeminent definition: "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."⁸⁸ This definition reflects the statute's remedial purpose,⁸⁹ and its breadth was recently recognized by the Court in *IBP, Inc. v. Alvarez*.⁹⁰ The contested activity in *Tennessee Coal* was the underground travel to and from the workplace by miners. The Court, in holding that the travel time was compensable, noted that the travel was "not primarily undertaken for the convenience of the miners Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations."⁹¹

84. *Tenn. Coal*, 321 U.S. at 597.

85. *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669–70 (1946).

86. *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 371 (3d Cir. 2007).

87. The statute uses the term work in several contexts, though. For example, in § 202, Congress states that the Act eliminates "labor conditions detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency, and general well-being of workers." 29 U.S.C. § 202 (2000) (emphasis added). More significantly, in the "Definitions" section, the term employ, whose definition is discussed in Part III.B, is defined as "to suffer or permit to work." *See id.* § 203(g) (emphasis added).

88. *Tenn. Coal*, 321 U.S. at 598.

89. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005).

90. *See id.*

91. *Tenn. Coal*, 321 U.S. at 599.

Soon after *Tennessee Coal*, the Court clarified that exertion was not necessary for an activity to constitute work: it held that an employer may hire a worker to “do nothing, or to do nothing but wait for something to happen.”⁹² The FLSA thus covers situations in which an employee is required to be on call at the employer’s premises.⁹³ The Court’s definition of work, while embraced by courts after *Tennessee Coal*,⁹⁴ has left open some room for interpretation of its two central requirements: (1) that the activity is controlled and required by the employer, and (2) that it is pursued necessarily and primarily for the benefit of that employer.

Case law indicates that the “controlled and required by the employer” element does not encompass activities that are undertaken by someone voluntarily, rather than at the behest of an employer.⁹⁵ For example, in *Leone v. Mobil Oil Corp.*, employees at Mobil were allowed, but not required, to accompany federal inspectors on walkarounds, nor were the walkarounds supervised or controlled by Mobil.⁹⁶ Rather, it was “a purely voluntary election by the employee” to accompany the inspectors.⁹⁷

As for the “pursued necessarily and primarily for the benefit of the employer” element, courts focus their analysis on the benefit inuring to the employer, not the benefits derived by the employee.⁹⁸ A collateral benefit or merely “some” measure of benefit inuring to an employer “does not automatically compel that the activity” is work.⁹⁹ The court in *Mobil Oil*, for example, found that although the health and safety walkaround inspections—which were required by federal law—may have benefited Mobil through reduced insurance premiums and fewer accident-related interruptions, Mobil employees were the primary beneficiaries of ensuring a safe work environment.¹⁰⁰ Thus, accompanying the inspectors was not work. In *Richardson v. Costco Wholesale Corp.*, Costco required workers

92. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

93. *Leone v. Mobil Oil Corp.*, 377 F. Supp. 1302, 1303 (D.D.C. 1974) (citing *Armour*, 323 U.S. 126; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

94. *See, e.g., Plumley v. S. Container, Inc.*, 303 F.3d 364, 370–71 (1st Cir. 2002); *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001); *Richardson v. Costco Wholesale Corp.*, 169 F. Supp. 2d 56, 60–61 (D. Conn. 2001); *Mobil Oil*, 377 F. Supp. at 1303–04.

95. *See Mobil Oil*, 377 F. Supp. at 1303–04.

96. *Id.* at 1304.

97. *Id.* (pointing out that employees have a clear choice to either accept the invitation for the walkaround or to continue in their normal working routine).

98. *See, e.g., S. Container*, 303 F.3d at 371.

99. *See Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (holding that although having students perform chores helps defray certain costs, the chores primarily benefit the students and do not constitute work as contemplated by the FLSA); *Richardson*, 169 F. Supp. 2d at 61.

100. *Mobil Oil*, 377 F. Supp. at 1304.

who had clocked out but not exited the premises to remain locked inside a warehouse until a collection procedure was finished.¹⁰¹ The court held, quite summarily, that although the lock-in procedure benefited Costco by ensuring the safety of its merchandise and cash, the procedure did not *primarily* benefit Costco because it safeguarded employees from break-ins.¹⁰² Thus, being locked in Costco was not work, and the employees were not entitled to payment for time spent locked inside the warehouse.

B. WHO IS AN EMPLOYEE UNDER THE FLSA?

Once the threshold inquiry of whether an activity constitutes work is satisfied, the next issue is whether the worker is an employee. Congress's intent to establish a far-reaching regulatory scheme in the FLSA is well-established,¹⁰³ and there is perhaps no greater indication of that intent than in the Act's definition of employee, employer, and employ. Since only statutorily covered employees—as opposed to noncovered independent contractors—are regulable under the Act,¹⁰⁴ the employment status of a worker is often central to whether or not the FLSA governs the circumstances. Unfortunately, though, the definitions within the FLSA are vague, circular, and “decidedly unhelpful.”¹⁰⁵ Employee is defined as “any individual employed by an employer.”¹⁰⁶ Employer is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”¹⁰⁷ And the term employ, whose meaning lies at the crux of employment status cases, is defined as “to suffer or permit to work.”¹⁰⁸

1. Suffer or Permit to Work

In its failure to furnish its definitions with any practical guidance, Congress has left to the courts the task of answering the question, what

101. See *Costco*, 169 F. Supp. 2d at 59.

102. See *id.* at 61. This author is skeptical, though, that the lock-in procedure was designed to, or actually did, primarily benefit the Costco employees.

103. See *supra* text accompanying notes 77–85.

104. See Nan S. Ellis, *Work Is Its Own Reward: Are Workfare Participants Employees Entitled to Protection Under the Fair Labor Standards Act?*, 13 CORNELL J.L. & PUB. POL'Y 1, 11 (2003). See also *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 264 n.2 (5th Cir. 1987) (noting the importance of proper categorization because an employer can avoid the minimum wage and overtime requirements of the FLSA by establishing that a particular person is an independent contractor and not an employee (citing *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1188 (5th Cir. 1979))).

105. See Ellis, *supra* note 104, at 11.

106. 29 U.S.C. § 203(e) (2000).

107. *Id.* § 203(d).

108. *Id.* § 203(g).

constitutes an employee-employer relationship under the FLSA?¹⁰⁹ To begin, the circularity of the definitions of employee and employer¹¹⁰ has rendered the suffer-or-permit standard the focal point of judicial interpretation. To ensure that the FLSA's minimum labor standards are realized, Congress included the suffer-or-permit-to-work language—which actually derives from state child labor statutes¹¹¹—with the intent¹¹² to cover an expansive group of workers.¹¹³ The courts have generally honored this intent by applying the FLSA's definition of employ broadly.¹¹⁴

Although the FLSA embraces a remarkably broad group of employees,¹¹⁵ its coverage is not limitless.¹¹⁶ The Supreme Court in *Walling v. Portland Terminal Co.* described its limits: “The definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.”¹¹⁷ The Court continued that the Act's purpose “was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”¹¹⁸ “The time or mode of [the expected] compensation . . . does not control the determination of whether one is an employee within the

109. See Ellis, *supra* note 104, at 11; Vadim Mahmoudov, *Are Workfare Participants “Employees”?: Legal Issues Presented by a Two-Tiered Labor Force*, 1998 ANN. SURV. AM. L. 349, 358.

110. See *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 467 (M.D. Tenn. 1979) (“The definition of ‘employee’ provided in the Act is virtually circular.”), *rev'd*, 668 F.2d 234 (6th Cir. 1981); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 296 (2001).

111. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 n.7 (1947). See also Goldstein et al., *supra* note 8, at 1103 (“The state child labor statute origin of the definition demonstrates that the definition's scope includes the expansive concept of suffering or permitting a person to work, in addition to the less expansive concept of employing.”).

112. Ellis, *supra* note 104, at 11. Senator Hugo Black, the principal sponsor of the FLSA who would later become Justice Black, described the term “employee” as the “broadest definition that has ever been included in any one act.” *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (citing 81 CONG. REC. 7657 (1937) (statement of Sen. Black)).

113. *Rutherford*, 331 U.S. at 728. See also Brief for the Administrator at 29, *Rutherford*, 331 U.S. 722 (No. 562) (“That Congress, in adopting this language, intended that it should be given broad scope similar to the construction of the State child labor laws is further evidenced by the fact that this same definition in the Fair Labor Standards Act applies to the child labor standards as well as to the wage and hour standards prescribed in the Act.”).

114. See Mahmoudov, *supra* note 109, at 359.

115. According to Justice Murphy, “[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.” *Rosenwasser*, 323 U.S. at 362.

116. See *Benshoff v. City of Va. Beach*, 180 F.3d 136, 140 (4th Cir. 1999).

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

118. *Id.*

meaning of the Act.”¹¹⁹ Employees can be paid by a unit of time or by any other measurement.¹²⁰ Applying this idea, the Supreme Court, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, held that “associates” of a nonprofit religious organization who staffed the organization’s various businesses were employees under the FLSA.¹²¹ Even though they received no cash compensation, the associates were given food, clothing, and shelter and had come to expect these benefits in exchange for their services.¹²²

2. Economic Reality

The Supreme Court has offered some vague guidance on the meaning of “suffer or permit to work” by announcing the “economic realities” test: “The test of employment under the Act is one of ‘economic reality.’”¹²³ Unfortunately, the Court’s elaboration on and application of this statement has been sparse.¹²⁴ We do know, however, that in distinguishing employees from independent contractors, the economic realities test is to be used in place of “technical concepts.”¹²⁵ The courts have eschewed one technical concept by giving no weight to the labels that parties, particularly those who wish to avoid FLSA coverage, use to describe employment relationships.¹²⁶ Accordingly, whether a worker is an employee or an independent contractor is not determined by the label given to him or her in a contract.¹²⁷ Rather than technical concepts, the determination of employment status depends “upon the circumstances of the whole activity.”¹²⁸

119. *Rosenwasser*, 323 U.S. at 363.

120. *Id.* Nonhourly modes of compensation will be translated to an hourly basis to determine whether the statutory minimum wage and overtime requirements have been met. *Id.* at 364. An employer cannot compensate an employee with anything less than the minimum wage in cash. Nonmonetary benefits alone are insufficient. *Id.* A worker’s nonmonetary benefits, however, are useful in determining whether an express or implied compensation agreement exists.

121. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985).

122. *See id.* at 292. The fact that the associates’ compensation was received in the form of benefits rather than cash was immaterial since the benefits constituted wages in a nonstandard form. *Id.* at 301.

123. *Id.* at 301 (citing *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)).

124. *See Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539–43 (7th Cir. 1987) (Easterbrook, J., concurring) (criticizing the idea of economic reality).

125. *Goldberg*, 366 U.S. at 33.

126. Ellis, *supra* note 104, at 12.

127. *See Mitchell v. Strickland Transp. Co.*, 228 F.2d 124, 126 (5th Cir. 1955). *See also Lauritzen*, 835 F.2d at 1545 (Easterbrook, J. concurring) (stating that the FLSA was “designed to defeat rather than implement contractual arrangements”); *Hargis v. Wabash R.R.*, 163 F.2d 608, 614 (7th Cir. 1947) (“Certainly an employer cannot circumvent the provisions of that Act by labeling an employee as an independent contractor whether such labeling is by agreement or otherwise.”).

128. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

In 1947, the Supreme Court in *Bartels v. Birmingham*¹²⁹ introduced the concept of “economic dependence,” a concept that has become greatly influential in the economic realities analysis. The Court declared that “employees are those who as a matter of economic reality are dependent upon the business to which they render service.”¹³⁰ The meaning the circuit courts have given to economic dependence is discussed in Part III.B.3 below.

Aside from the discussion above, the Supreme Court has largely left to the lower courts the task of working out the kinks of the economic realities test.¹³¹ Two commonly used versions of the test have developed: the *Silk* test and the *Bonnette* test.¹³² However, only the *Silk* test is relevant for the purposes of this Note. For the reasons below, the *Bonnette* test does not help resolve whether child participants on reality television are FLSA employees.

3. The *Silk* Test¹³³

In making the employee/independent contractor distinction, most circuits have adopted the *Silk* test, which involves consideration of the following six factors: (1) the degree of the alleged employer’s control, as compared to the worker’s control, over the manner in which the work is performed;¹³⁴ (2) the worker’s opportunity for profit or loss through his or her own initiative or managerial skill;¹³⁵ (3) the worker’s investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer’s business.¹³⁶ No single factor is determinative.¹³⁷

Taking a cue from the Supreme Court’s statement in *Bartels v.*

129. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

130. *Id.* For a discussion of the meaning of economic dependence, see *infra* Part III.B.2.

131. See Mahmoudov, *supra* note 109, at 359.

132. Sometimes courts within the same circuits apply different economic realities tests depending on the factual context of the case. Sandra F. Sperino, *Chaos Theory: The Unintended Consequences of Expanding Individual Liability Under the Family and Medical Leave Act*, 9 EMP. RTS. & EMP. POL’Y J. 175, 186 n.48 (2005) (highlighting the Eleventh Circuit’s use of one test for determining individual liability, and another test in the prison context).

133. This name derives from *United States v. Silk*, 331 U.S. 704 (1947).

134. See *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979).

135. See *Aimable v. Long & Scott Farms*, 20 F.3d 434, 443 (11th Cir. 1994).

136. See, e.g., *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006); *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987).

137. *Schultz*, 466 F.3d at 305.

Birmingham, the lower courts have used the six factors to “gauge the degree of [an individual’s] dependence” on the business for which he or she is working.¹³⁸ The economic reality of an employment relationship turns on the worker’s economic dependence on the business, and the factors should be applied with this ultimate notion in mind.¹³⁹ Although the concept of economic dependence has been the target of hostile commentary due to its vagueness,¹⁴⁰ the circuit courts have clarified that the correct economic dependence test “‘examines whether the workers are dependent on a particular business or organization *for their continued employment*’ in that line of business,” not whether the work provides a primary source of income.¹⁴¹ In other words, the ultimate concern is whether the worker is in business for himself or herself, or depends on an employer for the opportunity to render service.¹⁴² The Tenth Circuit has held that it was impossible to view a group of rig welders working in pipeline construction as in business for themselves because, given the time spent working for the defendant, they were unable to work for other employers.¹⁴³

a. Factor One: Control

The more control an alleged employer has over a worker, the more likely that worker is an employee. The relevant type of control is control over the manner in which the work is carried out, not control over whether the work is completed.¹⁴⁴

Sometimes this factor is characterized as an employer’s right or power to control the manner in which the work is performed.¹⁴⁵ To gauge this

138. *Lauritzen*, 835 F.2d at 1538.

139. *Id.*; *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 265 (5th Cir. 1987); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976).

140. See Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 *HAMLIN J. PUB. L. & POL’Y* 321, 322–23 (1989).

141. *Halferty*, 821 F.2d at 267–68 (quoting *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985)). Similarly, “[t]he economic-dependence aspect . . . 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.” *DialAmerica*, 757 F.2d at 1385.

142. See *Herman v. Express Sixty-Minutes Delivery Serv. Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (citing *Donovan v. Tehco*, 642 F.2d 141, 143 (5th Cir. 1981)); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

143. *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998) (citing *Dole v. Snell*, 875 F.2d 802, 808 (10th Cir. 1989)).

144. See, e.g., *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1047–51 (5th Cir. 1987).

145. See, e.g., *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). See also *Herman v. RSR Sec. Serv. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (“[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question” (citing *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984))).

power, courts often look at contractual terms and the parties' comparative rights.¹⁴⁶ In *Usery v. Pilgrim Equipment Co.*, the Fifth Circuit looked at the rules and restrictions contained in an agreement to show that a group of laundry pickup station operators was "totally dependent upon Pilgrim to provide direction or control in every major aspect of their work."¹⁴⁷ The agreement was drawn by Pilgrim and gave it the right to specifically enforce or declare the contract void if the operators failed to fulfill any of their obligations.¹⁴⁸ The court stated that "[c]ontrol is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity."¹⁴⁹ It also held that the operators' right to set hours was not sufficient control so as to render them separate economic entities.¹⁵⁰ The *Pilgrim* court concluded that "from all these facts . . . the operators cannot exert control over any aspect of their business lives independent of Pilgrim."¹⁵¹

Other times, however, this factor is characterized as the degree of control *actually exercised* by the alleged employer or employee.¹⁵² The Fifth Circuit in *Brock v. Mr. W Fireworks, Inc.*, for instance, stated that "it is not what the [workers] *could* have done that counts, but as a matter of economic reality what they *actually do* that is dispositive."¹⁵³ The court held that because the employer controlled the location and size of fireworks stands, the prices of fireworks, the type of merchandise sold, and the workers' hours, the workers had no independent control over any aspect of their business lives.¹⁵⁴ The court also held that the workers were not economically independent and did not stand as separate economic entities.¹⁵⁵ In the Second Circuit, "[a]n employer does not need to look over his workers' shoulders every day in order to exercise [sufficient]

146. See, e.g., *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 307 (4th Cir. 2006) ("The eight-page SOP . . . strictly dictated the manner in which the agents were to carry out their duties of providing security for the Prince and his family."); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1312 (5th Cir. 1976).

147. *Pilgrim*, 527 F.2d at 1312 (noting that the contract sets the prices, prevents the assignments of lease arrangements, requires that accounts be settled once a week, and prevents workers from posting signs without permission).

148. *Id.* at 1312–13.

149. *Id.*

150. *Id.* at 1312.

151. *Id.*

152. See, e.g., *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998).

153. *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1047 (5th Cir. 1987).

154. *Id.* at 1049–50.

155. *Id.*

control.”¹⁵⁶ In *Brock v. Superior Care, Inc.*, where the alleged employer supervised its nurses by monitoring their patient notes and by infrequently visiting job sites, that circuit found sufficient control to favor an employee-employer relationship.¹⁵⁷

b. Factor Two: Opportunity for Profit or Loss

An opportunity for a worker to reap profits or suffer losses cuts in favor of that worker being an independent contractor. Profit here does not mean a worker’s ability to be compensated for labor.¹⁵⁸ Rather, an opportunity to profit, in this context, means that the opportunity is based on the worker’s capital investment or entrepreneurial skill,¹⁵⁹ or as the Tenth Circuit has described it, when the opportunity is “consistent with the characteristics of being independent businessmen.”¹⁶⁰ Further, when an opportunity to profit is controlled by the employer, this factor cuts in favor of an employee-employer relationship.¹⁶¹ In a recent Eleventh Circuit case, this factor indicated that an installer of home satellite and entertainment systems was an independent contractor because he was paid per job, and thus could profit by accepting more jobs and performing them more efficiently.¹⁶² The worker was also able to accept jobs from other contractors.¹⁶³

c. Factor Three: Investment in Business

A capital investment in the employer’s business operations suggests that a worker is an independent contractor. The relevant investment is “the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.”¹⁶⁴ The worker’s investment should be compared to the employer’s investment in the overall operation.¹⁶⁵ Even where drivers from a courier delivery service purchased

156. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988).

157. *Id.*

158. *See Dubois v. Sec’y of Def.*, 161 F.3d 2, 5 (4th Cir. 1998) (unpublished table decision) (“Compensation derived from labor is not commonly referred to as ‘profit,’ but as wages.”); *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989).

159. *See Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985).

160. *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998).

161. *See Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1313 (5th Cir. 1976). *See also Beliz*, 765 F.2d at 1328 (“Of course, Galan could and did make a profit out of the work of his crew. But this was not based on risk of loss of any capital investment or his entrepreneurial skill.”).

162. *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App’x 782, 783 (11th Cir. 2006).

163. *Id.*

164. *Baker*, 137 F.3d at 1442 (quoting *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989)); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987) (holding that farm workers buying their own gloves was not a capital investment).

165. *Baker*, 137 F.3d at 1442. *See also Lauritzen*, 835 F.2d at 1537 (finding that the workers’

their own vehicles, car insurance, and two-way radios, the Fifth Circuit held that the investment was not significant relative to the employer's because the employer had purchased the computer system, the equipment leased to the drivers, the radio frequency license, and had paid the drivers' salaries.¹⁶⁶

d. Factor Four: Permanence of Working Relationship

The more permanent the relationship, the more likely it is that a court will find an employee-employer relationship.¹⁶⁷ “[I]ndependent contractors’ often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas ‘employees’ usually work for only one employer and such relationship is continuous and of indefinite duration.”¹⁶⁸ But many seasonal businesses “hire only seasonal employees, [and] that fact alone does not convert seasonal employees into seasonal independent contractors.”¹⁶⁹ Moreover, “even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to *operational characteristics intrinsic to the industry rather than to the workers’ own business initiative*.”¹⁷⁰ In the Tenth Circuit, “the proper test for determining permanency of the relationship [for seasonal workers] is not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season.”¹⁷¹ In one Tenth Circuit case, because the brevity of a rig welder’s employment was due to the intrinsic nature of the pipeline construction industry, the court characterized the work period as “‘permanent and exclusive for the duration of’ the particular job for which they [were] hired.”¹⁷²

e. Factor Five: Skill

When labor lacks the need for special skills and training, it cuts in

disproportionately small stake in a farming operation indicates that they are not independent contractors).

166. See *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303–04 (5th Cir. 1998).

167. See *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 309–10 (4th Cir. 2006).

168. *Baker*, 137 F.3d at 1442 (quoting *Dole*, 875 F.2d at 1811).

169. *Id.* (quoting *Lauritzen*, 835 F.2d at 1537).

170. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060–61 (2d Cir. 1988) (emphasis added).

171. *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054 (5th Cir. 1987).

172. *Baker*, 137 F.3d at 1442 (quoting *Lauritzen*, 835 F.2d at 1537). See also *Superior Care*, 840 F.2d at 1060–61 (noting that the transient nature of nurses reflects the nature of that profession and not the nurses’ success in marketing their skills independently); *Mr. W Fireworks*, 814 F.2d at 1053–54 (holding that firework stand operators are employees, notwithstanding the 80 percent turnover between seasons, because of the seasonal nature of the industry).

favor of finding an employee-employer relationship.¹⁷³ “Business sense, salesmanship, personality and efficiency” are not special skills that would suggest independent contractor status.¹⁷⁴ Furthermore, using special skills only cuts in favor of independent contractor status if workers “use those skills in [an] independent way” by exercising business judgment.¹⁷⁵ The Fifth Circuit, in finding that migrant farm workers were employees, has held that picking various vegetables was so unspecialized and simple that “‘even children can do it’—and here did.”¹⁷⁶

f. Factor Six: Integral to Business

The critical question in assessing this factor is whether the work is an essential part of the alleged employer’s business,¹⁷⁷ as opposed to an independently viable enterprise.¹⁷⁸ “[W]orkers are more likely to be ‘employees’ under the FLSA if they perform the primary work of the alleged employer.”¹⁷⁹ The Second Circuit has held that a nurse’s work constitutes the most integral part of a business that provides health care personnel on request,¹⁸⁰ and the Fourth Circuit has held that security agents were integral to a business that supplies security detail.¹⁸¹

4. The *Bonnette* Test

The four-factor *Bonnette* test derives from the Ninth Circuit’s decision in *Bonnette v. California Health and Welfare Agency*.¹⁸² It considers whether an alleged employer: (1) had the power to hire and fire the workers; (2) supervised and controlled work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.¹⁸³

Although adoption of this test by the circuits has likely been overstated by commentators,¹⁸⁴ it remains a viable economic realities

173. See *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 267 (5th Cir. 1987).

174. *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1314–15 (5th Cir. 1976).

175. *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1295 (3d Cir. 1991) (citing *Superior Care*, 840 F.2d at 1060).

176. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985) (quoting *Castillo v. Givens*, 704 F.2d 181, 191 (5th Cir. 1985)).

177. See *id.*

178. See *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979).

179. *Selker Bros.*, 949 F.2d at 1295–96 (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1585 (3rd Cir. 1985)).

180. See *Superior Care*, 840 F.2d at 1059.

181. See *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 309 (4th Cir. 2006).

182. *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1465–70 (9th Cir. 1983).

183. *Id.*

184. See, e.g., *Mahmoudov*, *supra* note 109, at 359 (“[The *Bonnette* test] is currently the test for

test.¹⁸⁵ However, because it emphasizes employer control over the terms and structure of the work performed, as opposed to the way in which the work is performed, the test is most useful in cases where an employee-employer relationship undoubtedly exists and the only question is between whom.¹⁸⁶ Consequently, this test is best suited for cases involving claims of joint employment because “when an entity exercises those four prerogatives, that entity, in addition to any primary employer, must be considered a joint employer.”¹⁸⁷ To no surprise then, the test has typically been used—as in *Bonnette* itself¹⁸⁸—in the joint employment context.¹⁸⁹

The *Silk* test, on the other hand, has been used primarily to distinguish independent contractors from employees, because the test “help[s] courts determine if particular workers are independent of *all* employers.”¹⁹⁰ Thus, because this Note asks whether reality children are employees or independent contractors, and not whether the various business entities behind the production and airing of reality programs are joint employers, this Note will apply the *Silk* test instead of the *Bonnette* test.

C. CHILD LABOR PROVISIONS OF THE FLSA

1. Scope and Purpose

The child labor provisions accompany the wage provisions and the overtime provisions as the third major pillar of the FLSA. The stated purpose of these provisions is to “protect the safety, health, well-being, and

determining employee status under the FLSA.” (emphasis omitted); 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) (“While some circuits have adopted different approaches . . . *Bonnette* is now widely accepted as the proper approach to the Supreme Court’s ‘economic realities’ test.”).

185. See, e.g., *Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991).

186. See *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992). See also *Mahmoudov*, *supra* note 109, at 359 (stating that “[t]he [*Bonnette*] test is dubious because it seems more suitable for determining whether one is truly an employer” rather than determining whether one is truly an employee).

187. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 67–68 (2d Cir. 2003).

188. *Bonnette*, 704 F.2d at 1470.

189. See, e.g., *Moreau v. Air Fr.*, 356 F.3d 942, 946–47 (9th Cir. 2004); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

190. *Zheng*, 355 F.3d at 67–68. This observation has been made by other circuits as well. See *Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994); *Vanskike*, 974 F.2d at 809. See also *Baystate Alternative Staffing*, 163 F.3d at 675 & n.9 (“[W]e find that the [*Bonnette*] factors . . . provide a useful framework. . . . The usefulness of the five [*Silk*] factors proffered by plaintiffs is significantly limited in this case, however, because the employee/independent contractor choice is no longer before us.” (citations omitted)).

opportunities for schooling of youthful workers.”¹⁹¹ The provision most pertinent to this Note is § 212(c), which was added to the FLSA in 1949.¹⁹² That section greatly broadened federal oversight of child labor and established a direct prohibition of “oppressive child labor.”¹⁹³ The provision¹⁹⁴ commands that, “No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce.”¹⁹⁵ “Oppressive child labor” is defined as:

a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer . . . in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation [that is] . . . particularly hazardous for the employment of children between such ages or detrimental to their health or well-being.¹⁹⁶

191. 29 C.F.R. § 570.101 (2006). *See also* *Lenroot v. Kemp*, 153 F.2d 153, 156 (5th Cir. 1946) (noting that a measure of responsibility for the administration of the child labor provisions of the Act has been placed on the federal district courts, which are charged with a not-to-be-treated-lightly duty to enforce national policy in the interest, and for the welfare, of America’s children).

192. 29 U.S.C. § 212(c) (2000).

193. 29 C.F.R. § 570.112(b).

194. 29 U.S.C. § 212(c). Two separate and distinct child labor provisions—§ 212(a) and § 212(c)—are included in § 212. Section 212(c) “applies to the employment by an employer of oppressive child labor in commerce or in the production of goods for commerce.” 29 C.F.R. § 570.103. Section 212(a), which differs fundamentally in its coverage, prohibits producers, manufacturers, or dealers from “ship[ping] or deliver[ing] for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed.” 29 U.S.C. § 212(a).

195. 29 U.S.C. § 212(c). Although consideration of these issues is beyond the scope here, this Note assumes that the service children provide to reality television programs is in the production of goods for commerce. “Commerce” is defined in the FLSA as “trade, commerce, transportation, transmission, or communication among the several States.” *Id.* § 203(b). In the Act, “[g]oods” means goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof.” *Id.* § 203(i). “Produced” is defined as:

produced, manufactured, mined, handled, or in any other manner worked on in any State [and] . . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Id. § 203(j). Reality children are undoubtedly involved in the production of reality programs given the fact that they are the ones being filmed. The end product, the television show, is clearly a good as contemplated by the FLSA. The shows are products that are commodified, sold, broadcasted, and potentially syndicated. This author even purchased the first season of *Kid Nation* on iTunes. Finally, reality television shows are “in commerce” because they are bought, sold, and transmitted across state lines.

196. *Id.* § 203(l). Occupations are declared hazardous by the Secretary of Labor after conducting a public hearing and taking advice from committees of interested parties. Declaring an occupation hazardous raises the minimum age of employment to eighteen years for those occupations. 29 C.F.R. § 570.120. Thus far, seventeen orders have been issued under the FLSA and are now in effect. For those orders, see *id.*

The age limitations are not absolute, though. The Secretary of Labor has the power to declare certain occupations safe for fourteen- and fifteen-year-olds. The regulations state:

Authority is also given to the Secretary to issue orders or regulations permitting the employment of children 14 and 15 years of age in nonmanufacturing and nonmining occupations where he determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.¹⁹⁷

The federal regulations also state that employing fourteen- and fifteen-year-olds in any occupation other than those specifically prohibited in the regulations¹⁹⁸ is permitted if the following conditions are met:

(i) employment *only outside school hours* and between the hours of 7 a.m. and 7 p.m., except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.; (ii) employment for not more than 3 hours a day nor more than 18 hours a week when school is in session; and, (iii) employment for not more than 8 hours a day nor more than 40 hours a week when school is not in session.¹⁹⁹

The employment of minors under fourteen years of age, however, is not allowed under any circumstances if the work is regulable under the FLSA.²⁰⁰

Congress endowed the Department of Labor ("DOL") with the authority to enforce the FLSA's directives.²⁰¹ An employer "who willfully violates any of the provisions . . . [may] be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both."²⁰² A willful violation also subjects an employer to a civil penalty of up to \$11,000 for each employee who was the subject of the violation.²⁰³

Child labor in violation of the FLSA remains widespread today, as

197. 29 C.F.R. § 570.117.

198. These prohibitions include the following occupations: (a) manufacturing, mining, or processing occupations; (b) occupations involving any power-driven machinery other than office machines; (c) public messenger services; (d) occupations declared to be particularly hazardous or detrimental to health or well-being by the Secretary; or (e) occupations in connection with: (1) transportation of persons or property by rail, highway, air, water, pipeline, or other means; (2) warehousing and storage; (3) communications and public utilities; and (4) construction. *Id.* § 570.119(a)-(f).

199. *Id.* § 570.119(f) (emphasis added).

200. *Id.* § 570.119.

201. *Id.* § 570.101.

202. *See id.* § 570.127. Additionally, any employment in violation of the child labor provisions may be enjoined by the United States District Courts. *Id.*

203. *Id.* § 579.5(a).

evidenced by a DOL nationwide investigation in 2004 that uncovered almost seven thousand violations.²⁰⁴ In the Preamble to the 2004 child labor regulations, the DOL stated that it is

constantly reviewing child labor standards because of changes in the workplace, the introduction of new processes and technologies, the emergence of new types of businesses where young workers may find employment opportunities, the existence of differing federal and state standards, and divergent views on how best to correlate school and work experiences.²⁰⁵

The child labor provisions provide minimum standards of health, safety, well-being, schooling, and compensation with which an employer must comply, but they do not necessarily supplant state laws. When a state law “establish[es] a higher standard than the standard established under [the FLSA],” an employer must comply with that state law.²⁰⁶ Moreover, although safety, health, well-being, and schooling opportunities are the policy considerations fueling the argument of this Note, children covered by the FLSA are nonetheless entitled to the wage and overtime guarantees of the Act.²⁰⁷

The definitions of employ, employee, and employer in § 212(c) mirror the definitions of those terms in the adult provisions.²⁰⁸

2. Exemptions

The FLSA exempts four groups of child laborers from § 212(c) even if those children meet the statutory definition of employee. The exemption pertinent to this Note excludes a child employed as an “actor or performer in motion pictures or theatrical productions, or in radio or television

204. 1 DANIEL ABRAHAM ET AL., FAIR LABOR STANDARDS HANDBOOK FOR STATES, LOCAL GOVERNMENTS, AND SCHOOLS ¶ 720 (2008). This statistic might be encouraging given that the DOL identified almost twelve thousand violations in 2001. *Id.*

205. *Id.* (citing 69 Fed. Reg. 75,382 (Dec. 16, 2004)).

206. 29 C.F.R. § 570.129.

207. *See id.* § 570.103(a). “The fact, therefore, that the employment of a particular child is prohibited by the child labor provisions . . . does not relieve the employer of the duties imposed by the wage and hours provisions to compensate the child in accordance with those requirements.” *Id.*

208. *See id.* § 570.113(b). “[T]he scope of coverage of section 12(c) of the Act is, in general, coextensive with that of the wage and hours provisions. . . . [because of] the similarity in the language used in the respective provisions and by statements appearing in the legislative history concerning the intended effect of the addition of section 12(c).” *Id.* Pointing out that the child labor provisions of the FLSA should be afforded the same breadth as the wage-hour provisions, the Supreme Court has recognized that the definition of employ “evidently derives from the child labor statutes.” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). For a discussion of the meaning of that term, see *supra* Part III.B.

productions.”²⁰⁹ But a child actor or performer will not be exempt if during the course of his or her employment, “the child spends any part of his time doing work which is covered [by the Act].”²¹⁰

Moreover, a child worker must be “*specifically exempt*” to avoid FLSA coverage.²¹¹ The Supreme Court has added that

[a]ny exemption from such humanitarian and remedial legislation must . . . be *narrowly construed*, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those *plainly and unmistakably within its terms and spirit* is to abuse the interpretive process and to frustrate the announced will of the people.²¹²

The Code of Federal Regulations (“CFR”) also requires the Secretary of Labor to construe the child labor exemptions narrowly and apply them only to those who are “plainly and unmistakably within their terms.”²¹³

The CFR defines the term performer, as used in this exemption, to be more inclusive than the term actor.²¹⁴ The CFR defines performer as:

[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.*²¹⁵

Since the Secretary of Labor has not been “directed otherwise by authoritative rulings of the courts,” the Secretary is required to follow the definition above when determining if a child is employed as a performer.²¹⁶ Case law, legislative history, and legal discourse concerning the interpretation or purpose of this exemption is basically nonexistent. As

209. 29 U.S.C. § 213(c)(3) (2000) (emphasis added). Section 213 also provides exemptions for: (1) employment of children in agriculture outside of school hours; (2) employment of children engaged in the delivery of newspapers to the consumer; and (3) employment by a parent or guardian in any occupation other than manufacturing, mining, or any occupation found by the Secretary to be particularly hazardous or detrimental to the health or well-being of children between the ages of sixteen and eighteen. *Id.* § 213(a), (b), (d).

210. 29 C.F.R. § 570.122.

211. *Id.* § 570.114 (emphasis added).

212. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (emphasis added).

213. 29 C.F.R. § 570.122.

214. *See id.* § 570.125.

215. *Id.* § 550.2(b) (emphasis added).

216. *Id.* § 570.101(b).

mentioned in Part I, the lack of discussion about this exemption may be due to an assumption that all children who appear on television are automatically actors or performers.

In writing the actor or performer exemption, Congress may have assumed that all children featured on television would necessarily be represented by SAG or AFTRA, and thus would not need FLSA protection. In fact, the phrase “actor or performer” perfectly matches the individuals represented by the Hollywood unions: SAG represents actors²¹⁷ and AFTRA represents performers.²¹⁸ Assuming Congress had this notion in mind when it drafted the exemptions in 1949, it could not have foreseen the emergence of reality television, whose child workers, unlike traditional child actors, do not clearly and automatically fit the exemption’s definition of performer.

IV. REALITY TELEVISION, *KID NATION*, AND THE FLSA

Since the debut of *Survivor* in 2000, there has been plenty of talk—in college classrooms, on the internet,²¹⁹ and at the water cooler—about this new American phenomenon called reality television. The genre can spark fascinating philosophical and sociological²²⁰ discussion, but the birth and subsequent boom of reality television has also generated a host of interesting legal issues.²²¹ The legal establishment has not yet figured out how to regulate the reality industry; the employment status of participants is no exception. And although this major industry continues to operate within a sphere of legal murkiness, scholarly discussion and litigation of these issues has been rare.

This Note focuses on one narrow issue: whether reality children are

217. Screen Actor’s Guild, About Us, <http://www.sag.org/content/about-us> (last visited Mar. 2, 2009).

218. American Federation of Television & Radio Artists, What Is AFTRA?, <http://www.aftra.com/aftra/whatis.htm> (last visited Mar. 2, 2009).

219. There are dozens of websites dedicated to reality television. *See, e.g.*, Reality TV World, <http://www.realitytvworld.com> (last visited Mar. 2, 2009); Reality TV Magazine, <http://www.realitytv magazine.com> (last visited Mar. 2, 2009); Reality TV Scoop, <http://www.realitytvscoop.com> (last visited Mar. 2, 2009); Reality Blurred, <http://www.realityblurred.com> (last visited Mar. 2, 2009).

220. *See, e.g.*, Seelig v. Infinity Broadcasting Corp., 119 Cal. Rptr. 2d 108, 115 (Ct. App. 2002) (“Before and after its network broadcast, *Who Wants to Marry a Multimillionaire?* generated considerable debate within the media on what its advent signified about the condition of American society.”).

221. Some of the unsettled legal issues surrounding the genre include: whether reality shows are copyrightable, *see* Sharp, *supra* note 11; whether certain shows are fixed illegal contests, *see* Podlas, *supra* note 23; whether reality show writers are employees, *see* Miller, *supra* note 11; and whether reality show participants are employees under state law, *see generally* Tiffany, *supra* note 10.

covered, and thus protected, by the FLSA. To date, no court has addressed this question. Nor has any court addressed whether adult reality participants are covered by the Act. Two things might explain this.

First, very few legal disputes are initiated (at least publicly) in which reality participants seek to enforce their rights as employees. Participants might be intimidated to speak to anyone, even a lawyer, about their experience on a show because they typically sign strict confidentiality agreements.²²² Although neither the FLSA's protections nor the right to enforce them can be contracted away,²²³ participants may fear hefty liquidated damages, as typically required by the agreements,²²⁴ if they reveal any information about their experience on the show. Additionally, clauses that deny a participant's employee status might also inhibit potential suits. Only one public suit has involved participants seeking to enforce their rights as employees. In that 2007 case, cast members from four seasons of NBC's *Average Joe* sued the network, alleging various California labor code violations and seeking at least minimum wage in compensation.²²⁵ The status of the suit is unknown at the writing of this Note.

Second, even if participants sue, it is probably in the best interest of networks and producers to settle rather than risk a holding that participants are employees. Though any analysis of FLSA coverage must be conducted on a case-by-case basis, just one case holding that a reality participant is an employee could set a dangerous precedent for reality producers.²²⁶ Given the number of hours that participants on reality television are filmed—in some cases twenty-four hours a day, seven days a week—producers are loath to pay them minimum and overtime wages. And in the case of children, producers should fear a ruling that would ban the use of minors or drastically limit the number of hours they can work on a show.

222. Tiffany, *supra* note 10. See, e.g., *SEG, Inc. v. Stillman*, No. B151712, 2003 WL 21197133, at *1 n.3 (Cal. Ct. App. May 22, 2003); *Seelig*, 119 Cal. Rptr. 2d at 112.

223. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985).

224. See, e.g., *Stillman*, 2003 WL 21197133, at *1 n.3. In *Stillman*, a former contestant on *Survivor*, after suing the producers for allegedly fixing the outcome, was countersued by producers for breach of confidentiality. A clause in the participation agreement stated that if a participant discloses any information about the show, CBS will be entitled to \$5 million in damages as well as recovery of any prizes. *Id.*

225. Sharifah Chammas, *Reality Stars Bite Back at Network*, CANYON NEWS, May 29, 2007, http://www.canyon-news.com/artman2/publish/Television/article_5556.php.

226. According to one entertainment lawyer, "If [the *Average Joe* participants] are determined to be employees by the Court, then the entire landscape of reality television will change Networks may begin to walk a tightrope, unsure of how much they can direct participants without converting them into an employee." *Id.*

If the children on *Kid Nation* brought a suit asserting their rights under the FLSA, a court would likely face three main issues: (1) Did their participation constitute work?; (2) Were they employees?; and (3) Were they exempt as actors or performers? The remainder of Part IV considers these three questions, ultimately concluding that the answers are (1) yes, (2) yes, and (3) no.

A. DID PARTICIPATION ON *KID NATION* CONSTITUTE WORK?

Reality television, because of its large audience and low production costs, has become a very profitable enterprise for networks and producers. There is money to be made in advertising, syndication, DVD sales, and more.²²⁷ But without the services of the real people featured on those programs, there would be no audience²²⁸ and thus no profits. But do their services constitute work, as contemplated by the FLSA?

Producers have been known to respond to employment complaints by arguing that, as a threshold matter, reality participants are simply not performing work. CBS lawyers, responding to allegations of child labor violations, employed this tactic as well, claiming that special work permits²²⁹ were not necessary because the children were “not working,” but instead “were participating.”²³⁰

The Supreme Court has stated that the definition of work in the FLSA is (1) a physical or mental exertion (whether burdensome or not) that is (2) controlled or (3) required by an employer and (4) that is “pursued necessarily and primarily for the benefit of the employer and his business.”²³¹ According to Jonathon Anschell, general counsel of CBS, “[t]he cameras [on the *Kid Nation* set] are following people through an experience, but those people are not working in the same way that one normally thinks of working a job.”²³² But even if an activity does not

227. William Booth, *Reality Is Only an Illusion, Writers Say*, WASH. POST, Aug. 10, 2004, at C1.

228. See RICHARD KILBORN, STAGING THE REAL 74 (2003).

229. New Mexico child labor laws limit children under the age of fourteen to forty-four hours of work per week and eight hours per day, unless the employer has been granted a special permit. Wyatt, *supra* note 6. The *Kid Nation* Producers did not apply for this permit. *Id.* When an inspector from New Mexico’s Department of Workforce Solutions tried to enter Bonanza City to inspect work permits, the Producers would not let him on the property. Fernandez, *supra* note 72.

230. Fernandez, *supra* note 5. But see Maria Elena Fernandez, *Is Child Exploitation Legal in ‘Kid Nation’?*, L.A. TIMES, Aug. 17, 2007, at E1 [hereinafter Fernandez, *Child Exploitation*] (“‘To say that these kids aren’t working is absurd,’ said Mark Andrejevic. . . . ‘This is a smooth move that reality television has been able to make In any other industry, this would be called exploitation.’”).

231. *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

232. Maria Elena Fernandez, *CBS Addresses ‘Kid Nation’ Controversies*, L.A. TIMES, Aug. 22, 2007, <http://articles.latimes.com/2007/aug/22/entertainment/et-kidnationweb22>.

conjure up traditional notions of labor, if it fits the Court's definition, it is work. Examining each factor and comparing it to the activities of the *Kid Nation* participants—and of reality participation in general—reveals that their participation fits squarely into the Court's definition of work.

1. Physical or Mental Exertion

Participation on a reality program usually involves physical *and* mental exertion. While the objective of many shows is to test the physical and mental fitness of its cast members,²³³ simply *being on* a show and dealing with the stress associated with having one's private life under the microscope involves a substantial degree of mental exertion. Even in the unlikely event that a program demands no exertion whatsoever, participation on that show can still be work because a worker can be hired to do nothing at all.²³⁴

Participation on *Kid Nation* certainly involved physical exertion. In its investigation of potential state law violations, the New Mexico Department of Labor found that the physical labor lasted as many as fourteen hours a day,²³⁵ or as ten-year-old Taylor described it, “‘from the crack of dawn when the rooster started crowing’ until at least 9:30 p.m.”²³⁶ The work included hauling wagons,²³⁷ cooking meals, managing stores, and cleaning outhouses.²³⁸ In the limited interviews allowed by CBS, a few children characterized their participation as work,²³⁹ admitting that they had never worked so hard in their lives.²⁴⁰ The Participation Agreement itself warns that “‘challenges or tasks . . . may require physical and mental dexterity.”²⁴¹

The *Kid Nation* experience involved mental exertion as well. Not only

233. On *Survivor*, “the playing of the game still has its more challenging side, in that the players will have to display various types of physical and mental prowess, not to mention low animal cunning, in order to survive.” KILBORN, *supra* note 228, at 75.

234. See *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

235. Fernandez, *Child Exploitation*, *supra* note 230. The children's parents agreed that they could be filmed twenty-four hours a day. Participation Agreement, *supra* note 4, at 12.

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

237. *Id.*

238. Fernandez, *supra* note 5.

239. Wyatt, *supra* note 236 (“‘Everyone usually had a job,’ said Mike, an 11-year-old from Bellevue, Wash., who participated in the show. Among them were cooking, cleaning, hauling water and running the stores, where, he said: ‘It was hard work, but it was really good. It taught us all that life is not all play and no work.’”).

240. Fernandez, *Child Exploitation*, *supra* note 230. One journalist observed that “‘most of the kids looked pooped and tired at the end of a steady workday.” Jim Bawden, *Manipulative and Boring. That's Kid Nation*, TORONTO STAR, Sept. 20, 2007, at E2.

241. Participation Agreement, *supra* note 4, at 2.

did the children have to create and run their society, they had to figure out how to do it without seeing or communicating with their parents.²⁴² The Participation Agreement recognizes that not being able to speak to parents “may expose [the] Minor . . . to severe mental stress.”²⁴³ One boy returned home because he missed his family too much²⁴⁴ and others were shown crying for their parents.²⁴⁵ Mental energy was also exerted in acclimating to the constant presence (except in the bathroom²⁴⁶) of the cameras.²⁴⁷ Some have said that the most challenging aspect of the experience was getting used to the constant filming.²⁴⁸ In sum, the physical and mental demands on the children satisfy the exertion element.

2. Controlled by Alleged Employer

Everyone’s participation on a reality show is controlled by the show’s producers. Control in this context is broader than the type of control that pertains to the employee/independent contractor analysis. In that context, the relevant inquiry is whether the employer has control over *how* the work is accomplished. Here, control stands for overseeing and monitoring whether the activity is performed at all.²⁴⁹ Unlike in *Mobil Oil* where the employer did not supervise the employees’ participation in walkaround inspections, on-set participation on a reality show is always supervised and monitored by producers. The around-the-clock filming and subsequent review of the footage necessarily involves substantial supervision and oversight.²⁵⁰ Moreover, participation agreements typically grant producers unlimited authority to monitor activity, set and change the rules of the show, and remove participants at will.²⁵¹

Like on all other reality programs, *Kid Nation* Producers oversaw and monitored the children’s participation. Cameras followed the kids through

242. *Id.* at 2–3.

243. *Id.* at 3.

244. Elfman, *supra* note 65.

245. Bawden, *supra* note 240.

246. Participation Agreement, *supra* note 4, at 8–9.

247. *Id.* at 12. “I irrevocably grant the Producers the right . . . to videotape . . . the Minor [and] the Minor’s actions . . . on an up to 24-hour-a-day, 7-days-a-week basis, whether the Minor is aware or unaware of such videotaping.” *Id.*

248. Fernandez, *Child Exploitation*, *supra* note 230.

249. *See Leone v. Mobil Oil Corp.*, 377 F. Supp. 1302, 1303 (D.D.C. 1974).

250. It is actually difficult to find a job where a worker’s activity is as heavily supervised as in reality television.

251. One example of a producer’s sweeping control over participation is former *The Bachelorette* contestant Trista Rehn’s participation agreement. Tiffany, *supra* note 10, at 20–21.

all daily activities²⁵² and all of the footage was then presumably watched by the editing staff. Monitoring the children's behavior was not limited to the editing room, however; contrary to the "no adults" gimmick, there was actually a large behind-the-scenes presence of adults looking after the children.²⁵³ Control over *whether* the children participated is further illustrated by the Participation Agreement; it gave the Producers the right to change the rules of the show and disqualify participants at any time and for any reason.²⁵⁴

3. Required by Alleged Employer

The on-screen activity of a reality participant will always be required by networks and producers who force participants to sign agreements that spell out their obligations before, during, and after the show's production.²⁵⁵ The situation in *Mobil Oil* provides an example of an employer *not* requiring an activity. There, Mobil did not compel or require workers to participate in walkaround inspections as part of their work responsibilities. Participation on a reality show is not a voluntary undertaking like the walkarounds, though.²⁵⁶ Rather, everything about their participation is arranged and required by producers: participants are carefully chosen out of large applicant pools,²⁵⁷ the settings are meticulously constructed,²⁵⁸ and the activities are premeditated and designed by a production team.²⁵⁹ Participation agreements thus illustrate that the activities are not undertaken voluntarily, but are instead the result of a preplanned requirement to appear on the program.

In this respect, *Kid Nation* is no different than other reality shows: the children participated at the behest of CBS and Good TV. They and their

252. See Participation Agreement, *supra* note 4, at 8 (stating that "the Minor will have no privacy").

253. Wyatt, *supra* note 6. Tom Forman admitted that a crew of over one hundred adults, including pediatricians, children psychologists, animal wranglers, and nutritionists were "standing back and watching the kids, with instructions to step in if something was going wrong and anybody was in danger." Rob Salem, *Kid Nation: Why the Fuss?*, TORONTO STAR, Sept. 15, 2007, at E15.

254. Participation Agreement, *supra* note 4, at 10.

255. See, e.g., Holmes, *supra* note 58, at 17; Participation Agreement, *supra* note 4.

256. "Voluntary" has two meanings in this Note. The first connotes taking a course of action knowingly; for instance, adult reality participants who *voluntarily* place themselves in a position for public ridicule and a bruised reputation. For a brief discussion of the voluntariness of child participation on reality television, see *supra* Part II.D. The second meaning is relevant to the current discussion and connotes performing an activity of one's own volition, rather than at the behest of an employer.

257. Ugolini, *supra* note 38, at 78; Elizabeth Majore, *Reality TV Shows: Here to Stay or a Passing Phase?*, AM. CHRON., Jan. 31, 2008, <http://www.americanchronicle.com/articles/50832>.

258. See Sharp, *supra* note 11, at 195.

259. Podlas, *supra* note 23, at 162.

parents went through a lengthy application and interview process²⁶⁰ at the end of which they were required to sign a comprehensive document specifying the children's and parents' obligations. Unlike the employer in *Mobil Oil* who did not tell its workers that they had to accompany the inspectors, almost every aspect of the children's participation was contractually required by CBS and Good TV.

4. Primarily and Necessarily for the Benefit of the Alleged Employer

The Supreme Court in *Tennessee Coal* found that the workers' underground travel to and from work primarily and necessarily benefited the employer's mining operations.²⁶¹ Similarly, the activities performed on *Kid Nation* were undertaken primarily and necessarily for the benefit of the Producer's business operations. The services of any participant on any show will primarily benefit some business entity, for that matter. The benefit of their service is clear: producers find real people to film and then reap profits from advertising and DVD sales. Viewers tune in because they are fascinated and entertained by these real people,²⁶² so a participant's activity—being on the show—must directly benefit networks and producers.²⁶³

One counterargument is that several reality shows offer nonmonetary benefits to participants. Recent shows have helped individuals kick drug addiction, lose weight, renovate a home, and transform their lives in other positive ways. However, an inquiry into whether an activity constitutes work must focus on the *employer's* benefit, not the employee's.²⁶⁴ As noted above, networks and producers benefit greatly from the services of reality participants. This benefit, unlike the benefit to the employer in *Mobil Oil*, is not merely collateral or incidental, since the purpose of retaining their services is to reap economic reward.²⁶⁵ Even though an individual's

260. About five hundred applicants were interviewed during the first round and about sixty finalists were invited for second interviews. *Kid Nation Application* (Feb. 27, 2008) (on file with author).

261. *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 599 (1944).

262. See KILBORN, *supra* note 228, at 74 (claiming that the primary appeal of reality television is seeing how "'ordinary' people responded when placed in a series of highly contrived situations").

263. See Holmes, *supra* note 58, at 17.

264. See Plumley v. S. Container, Inc., 303 F.3d 364, 370–71 (1st Cir. 2002).

265. See Bill Carter, *ABC Cancels a Planned Reality Show*, N.Y. TIMES, Oct. 22, 2001, at C1. Andrejevic adds that,

[i]n order to legitimate the free labor that they extract from cast members, every reality show producer claims that this is some kind of experience where people grow and learn about themselves The producers rely on the tradition of the documentary to make this seem like it's not exploitation when the only true commitment they have is to turn a profit.

Fernandez, *supra* note 5 (quotation marks omitted).

experience on reality television may prove self-beneficial, television is not a philanthropic industry.

Participation on *Kid Nation* may have had very positive effects on the children,²⁶⁶ and those benefits should not be devalued. But to claim that the show was not produced chiefly to turn a profit ignores the primary motive of television production.²⁶⁷

For the reasons stated above, participation on *Kid Nation* constituted work under the FLSA. The Producers have made the claim that the children were not working but rather going to summer camp²⁶⁸—a claim that has been repudiated by New Mexico authorities.²⁶⁹ Obviously it is in the Producers' best interests to characterize the *Kid Nation* experience as anything other than work, but the facts strongly support a finding that the kids were working for those forty days.

B. WERE THE *KID NATION* CHILDREN EMPLOYEES UNDER THE FLSA?

Once it is established that a reality participant's activities satisfy the definition of work, his or her employment status must be determined: employees are covered by the FLSA and independent contractors are not. Because the use of children on reality television is a new but budding trend, taking into account facts about the genre in general can shed some light on whether the *Kid Nation* participants—as well as future reality children—are employees for FLSA purposes. Most reality shows share some common characteristics—conflicts between participants, meticulous editing, staged settings—but any inquiry into FLSA coverage must be conducted on a case-by-case basis. Thus, although comparisons to other reality shows will complement the analysis, arguing for a categorical coverage of all reality participants would ignore the fact-sensitivity

266. Forman has said that “almost to a one,” the kids consider *Kid Nation* the highlight of their lives. Ethics Scoreboard, Lies and Child Exploitation: The Making of “Kid Nation” (June 23, 2007), <http://www.ethicsscoreboard.com/list/kidnation.html>. *But see id.* (“Unfair and endangering treatment of minors can’t be justified because the children may enjoy the experience. Kids might enjoy a trip to a bordello.”).

267. For a discussion of how *Kid Nation* was successful in attracting advertisers, see Wyatt, *supra* note 3.

268. James Hibberd, *CBS Crosses the Line: What's Next?*, IN THE NEWS, http://www.minorcon.org/cbs_crosses_the_line.html (last visited Mar. 24, 2009). According to Forman: “‘We were essentially running a summer camp’ . . . ‘They’re participants in a reality show. They’re not “working.” They’re living and we’re taping what’s going on. That’s the basis behind every [legal] document for the show.’” *Id.*

269. State officials have said that production did not comply with state laws that regulate the licensing of summer camps. Wyatt, *supra* note 6.

requirement.

This section considers whether the participants on *Kid Nation* were employees, as contemplated by the FLSA. If the suffer-or-permit-to-work standard is satisfied, then the children were employees under the Act.

The Supreme Court has articulated two limitations to the suffer-or-permit-to-work standard by stating that it does not include people who lack an “express or implied compensation agreement” and people who “work for their own advantage on the premises of another.”²⁷⁰

First, reality show participants typically enter into express compensation agreements. Contestants on *Big Brother*, for example, have been paid about \$2 an hour for time spent on camera, which happened to be twenty-four hours per day.²⁷¹ The plaintiffs in the *Average Joe* lawsuit, who are seeking—at a minimum—the minimum wage, claim that NBC promised compensation but never paid them a cent.²⁷² Even when participants are paid, producers and networks tend to refer to those payments as gifts²⁷³ or stipends, not wages that could create an employment relationship. Some participants, however, neither receive nor are promised any monetary compensation,²⁷⁴ and that could place them outside the ambit of the FLSA.

Second, it is unlikely that reality participants can ever “work for their own advantage on the premises of another.” Participants are carefully chosen in order to make the show as popular as possible. As noted in Part IV.A.4, the reason for their presence on the show is primarily for the network’s and producers’ advantage, regardless of the collateral benefits the experience may provide for the participants.

The children on *Kid Nation* do not fall into these two limitations. First, the children entered into express compensation agreements to receive \$5000.²⁷⁵ According to Forman, however, it was simply a gift,²⁷⁶ a “thank-

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

271. ANDREJEVIC, *supra* note 13, at 143.

272. *See Chammas*, *supra* note 225.

273. Whether or not nonmonetary gifts constitute compensation is an interesting legal issue that is outside the scope of this Note.

274. Many reality programs involve competitions where the winners receive large cash prizes. Whether the prospect of those prizes constitutes an implied compensation agreement, while outside the scope of this Note, is another interesting legal question.

275. Participation Agreement, *supra* note 4, at 1. According to one commentator’s calculations, “if they did work 14-hour days for 40 days—[they] got less than \$9 an hour. No wonder the broadcast networks aren’t about to give up on reality TV.” Ryan, *supra* note 1.

276. *Real Trouble?*, WKLY. READER, Sept. 17, 2007, at 7.

you for participating.”²⁷⁷ CBS lawyers, echoing the language in the agreement,²⁷⁸ added that “those were not wages and did not create an employee relationship.”²⁷⁹ But the FLSA was designed to defeat rather than implement contractual arrangements.²⁸⁰ And since compensation can take the form of any measurement, at any time, and by any mode,²⁸¹ the labels placed on the \$5000 simply have no influence in this analysis. If the nonmonetary benefits of food, clothing, and shelter given to the workers in *Tony & Susan Alamo Foundation* constitute compensation, so too should a \$5000 payment.²⁸²

Second, the children did not work for their own advantage in Bonanza City. As noted in Part IV.A.4, the services of these children were enlisted primarily for the economic advantage of CBS and Good TV. All benefits to the children were incidental or secondary to that purpose.

Because the kids (through their parents) entered into express compensation agreements and did not “work for their own advantage,” we must now use the economic realities test to determine if they were employees or independent contractors. The children were essentially labeled independent contractors in the Participation Agreement, which states that “the Minor’s appearance as a participant . . . is not employment and is not subject to . . . any state or federal labor regulations.”²⁸³ But the economic realities test supplants and defeats such technical concepts, so the Participation Agreement does not render their work unregulable under the FLSA.²⁸⁴ Applying the six *Silk* factors, the following discussion considers whether the children are, as a matter of economic reality, FLSA employees.

1. Factor One: Employer Control

One of the most common criticisms of reality television is that the

277. Fernandez, *supra* note 5.

278. Participation Agreement, *supra* note 4, at 1 (“[T]he purpose of covering the Minor’s incidental expenses and is not, in any way whatsoever, a wage, salary or other indicia of employment.”).

279. Wyatt, *supra* note 236.

280. Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1544–45 (7th Cir. 1987) (Easterbrook, J. concurring).

281. See *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945).

282. The children actually had opportunities to earn even more money. Each episode, a panel of four children selected and awarded the hardest working participant with \$20,000. Alessandra Stanley, *Just Like a Supervised ‘Real World,’ for Children*, N.Y. TIMES, Sept. 20, 2007, at A17. Whether or not this prize constitutes “compensation” for the purposes of this argument is immaterial because the stipend alone is sufficient.

283. Participation Agreement, *supra* note 4, at 10.

284. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961).

staged events,²⁸⁵ highly contrived settings,²⁸⁶ prewritten plot lines,²⁸⁷ fabricated conflicts,²⁸⁸ and slick editing²⁸⁹ all contribute to a false representation of reality. It is no secret that the majority of reality shows do not reflect the participants' actual lives, leading Andrejevic to describe the genre as "the reality of artifice"²⁹⁰ and "manipulated authenticity."²⁹¹ This notion is relevant to employment status because the artifice created by producers, within which the participants interact, affords producers "much greater control over the events which form[] the raw ingredients of the programming."²⁹² Because the contrived nature of reality television is well-known, those who agree to participate necessarily do so on the employers' terms.²⁹³ Employer control can be demonstrated in two ways: (1) an employer's right to control the manner of participation and (2) an employer exercising that right. Both types of control show that the individuals working behind the cameras generally "have more control over the [show's] stories than the onscreen participants do."²⁹⁴ In contrast to the type of control discussed in Part IV.A.2, the relevant control here is over the way in which the work is performed.

a. Right to Control

Like the Fifth Circuit's review of the contract in *Pilgrim*, a review of a show's participation agreement will often lead to the conclusion that reality participants are dependent on networks and producers to provide direction and control in every major aspect of their work.²⁹⁵ The *Kid Nation* agreement demonstrates the Producers' substantial right to control the manner in which the children performed their work. The Participation Agreement states that

I understand . . . that the Minor shall abide by all additional rules not contained in the Official Rules concerning specific tasks or instructions

285. KILBORN, *supra* note 228, at 78 ("The feature that is common to most of the more recently developed reality formats is that they all, to a greater or lesser extent, depend on the staging of an event.").

286. See Holmes, *supra* note 58, at 21.

287. See Podlas, *supra* note 23, at 162.

288. See, e.g., Sharp, *supra* note 11, at 195.

289. ANDREJEVIC, *supra* note 13, at 132.

290. *Id.* at 138.

291. *Id.* at 197.

292. KILBORN, *supra* note 228, at 74.

293. See *id.*

294. Miller, *supra* note 11, at 199.

295. For an example of such an agreement, see Tiffany, *supra* note 10, at 20. The agreement, signed by a contestant on *The Bachelorette*, afforded producers "unbridled control over the manner in which [the participant] could carry out the main points of the show." *Id.* at 21.

that are a part of the Program whether given to the Minor by the Council or otherwise, and that the Official Rules or any other rules may change at any time, for any reason or for no reason at all. I and the Minor further agree that the Minor shall comply with all directives and instruction given to the Minor by the Council and Producers during the course of the production of the Program. . . . I understand and agree that the Minor may be disqualified from the Program at any time or penalized by the Producers as Producers deem fit if the Minor fails to abide by the Official rules.²⁹⁶

The Producers' unbridled control is also illustrated by their right to ban any items from the children's possession²⁹⁷ and to search their belongings at any time.²⁹⁸ Although the children were given the right to terminate their participation,²⁹⁹ the contract gives them (and their guardians) no meaningful right to control the way in which they participated.

b. Exercising the Right to Control

Although participation agreements usually contain strict confidentiality clauses, enough has been learned about reality television to conclude that producers and networks commonly exercise their right to control the cast's participation.³⁰⁰ Much of the control is exercised before the participants even begin their work. Producers select the filming location and plan the show's activities,³⁰¹ predetermine the rules of participation,³⁰² and often draft plot lines.³⁰³ Producers typically control participation *during* production as well.³⁰⁴ "[P]roducers are not above tweaking the cast members' environment in order to generate interesting results," says

296. Participation Agreement, *supra* note 4, at 10.

297. *Id.* at 9.

298. *Id.*

299. *Id.* at 5.

300. Although each show is different, "[o]ne should, of course, at no time underestimate the degree of manipulation and control being exercised by [a] show's producers. Whether or not programme [sic] makers admit it, the participants are all dancing to their tune." KILBORN, *supra* note 228, at 79.

301. Tiffany, *supra* note 10, at 17–20.

302. *Id.* Participants on *Big Brother*, for instance, are not permitted to leave the grounds of their shared house, undeniably controlling how participation is carried out.

303. See James Poniewozik, *How Reality TV Fakes It*, TIME, Feb. 6, 2006, at 60.

304. See Miller, *supra* note 11, at 188 ("[S]hows such as *Survivor* created the special living environment where producers designed the format of the show and controlled the day-to-day activities."). But see ANDREJEVIC, *supra* note 13, at 103 (discussing how Jon Murray, co-producer of MTV's *The Real World*, claims that he does not have a lot of control during the filming process, but rather "what we have is the control to make choices during the editing").

Andrejevic.³⁰⁵ Richard Kilborn, the author of *Staging the Real: Factual TV Programming in the Age of Big Brother*, agrees that “[p]roducers of these shows will certainly leave no stone unturned to ensure that, first, participants are manoeuvred [sic] in such a way as to increase the likelihood of dramatic exchanges occurring.”³⁰⁶

Similarly, enough has been learned about *Kid Nation* to conclude that CBS and Good TV exercised significant control over day-to-day activity. Instead of building their own society, critics have complained, the children just “followed instructions and suggestions by producers—in the form of a mysterious journal—at every turn.”³⁰⁷ Upon watching the program, it becomes clear that the team of adults overseeing production had a hand in every activity carried out by the children.³⁰⁸ Without adult assistance, to point out the obvious, *Kid Nation* could not have existed, and commentators have recognized that adult producers assisted the children in every facet of their participation.³⁰⁹ The Second Circuit has stated that to exercise sufficient control, an employer need not “look over his workers’ shoulders every day.”³¹⁰ In the case of *Kid Nation*, however, the team of adults in Bonanza City looked over the children’s shoulders all day, every day.

CBS and Forman argue that the children controlled their own participation because they set their own hours and decided when to go to sleep and wake up.³¹¹ However, the kids decided only when to work their fake jobs—cook, store manager, laborer—not when they would be filmed. Although those fake jobs constituted work, this Note argues that merely

305. ANDREJEVIC, *supra* note 13, at 104.

306. KILBORN, *supra* note 228, at 79. During a season of MTV’s *Road Rules*, for example, producers “purposely put [participants] in a situation where [they] didn’t have any money or any food to watch [them] argue about it.” ANDREJEVIC, *supra* note 13, at 104. Even on *Big Brother*, a show that appears to passively document the daily behavior of a dozen people locked in a house, “cast members knew that . . . the way they lived, down to details of money, food, and shelter, were out of their control.” *Id.* at 105.

307. Maria Elena Fernandez, *Lost Chances in ‘Kid Nation,’* L.A. TIMES, Nov. 30, 2007, at E33. The journal, the kids were told, was left by the past inhabitants of Bonanza City. This journal, which was obviously planted by the Producers, contains suggestions of how the children should run the abandoned town so as to avoid making the same mistakes as the town’s past (and imaginary) residents. In actuality, the journal instructed the children on how to conduct their day-to-day activities.

308. See Andy Dehnart, *Shows Protect Contestants from Each Other*, MSNBC, Feb. 24, 2008, <http://www.msnbc.msn.com/id/23323253>. “The sham contests the kids competed in . . . were obviously made up by adults,” observed one journalist. Bawden, *supra* note 240.

309. See, e.g., Collins, *supra* note 7 (“What’s clear is that the kids were overseen by TV producers and film crews who egged on the little ones to act out a junior-varsity version of ‘Survivor.’”).

310. Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988).

311. See Fernandez, *Child Exploitation*, *supra* note 230.

appearing on *Kid Nation* was work for the purposes of the FLSA.

In sum, the *Kid Nation* children, per the terms of the Participation Agreement, were given almost no power to control their own participation. The little control they were able to exert over their day-to-day activities surely does not indicate, as the circuit courts require,³¹² that the children acted as separate economic entities. Thus, the control factor—a factor often given lopsided weight by the courts—strongly favors a finding that the children are employees.

2. Factors Two and Three: Opportunity for Profit or Loss and Investment

These two factors likely favor a finding that the children are employees. Receipt of the \$5000 payment is not an opportunity for profit, because although Forman characterized it as a “thank you,”³¹³ the payment is a form of compensation. The courts have held that compensation for labor is not an opportunity for profit.³¹⁴ The only other opportunity for financial reward was a \$20,000 gold star awarded each week to the participant who worked hardest that week. The gold star was awarded by the town council, a rotating group of four children who voted on the weekly winner.³¹⁵ At first glance, the gold star might seem like an opportunity for profit, but the opportunity to win that prize was not based on any capital investment or entrepreneurial skill, as the *Silk* test requires. Moreover, winning the award was not the result of an independent business judgment. The award is more akin to an employee bonus. Finally, since the children made no monetary investment whatsoever in the show, there was no opportunity for them to lose money. For these reasons, factors two and three weigh in favor of finding an employee-employer relationship between the children and the Producers.

3. Factor Four: Permanence of Working Relationship

On *Kid Nation*, unlike *Survivor* or *American Idol*, cast members were not eliminated throughout the season. Unless a child opted to leave the show, he or she was guaranteed forty days of work. Although forty days is not very permanent in most lines of work, participation on a reality show is seasonal in nature. The brevity of the work term on *Kid Nation* was due to

312. See *supra* text accompanying notes 145–157.

313. Fernandez, *supra* note 5.

314. See *Dubois v. Sec’y of Def.*, 161 F.3d 2, 5 (4th Cir. 1998) (unpublished table decision) (“Compensation derived from labor is not commonly referred to as ‘profit,’ but as wages.”); *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989).

315. Fernandez, *Child Exploitation*, *supra* note 230.

characteristics intrinsic to the reality television industry rather than the children's own business initiative, so the case law surrounding seasonal workers likely applies here.³¹⁶ Their services were not needed beyond the forty days of filming.

For seasonal workers, “the proper test for determining permanency of the relationship is not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season.”³¹⁷ The “entire operative period” of the season was forty days. All of the *Kid Nation* children, minus eight-year-old Jimmy, who decided to go home in the first episode, stayed in Bonanza City for the entire season; thus, this factor should cut in favor of finding an employee-employer relationship.

4. Factor Five: Skill

The *Kid Nation* cast was full of ambitious, talented, and accomplished children, but their participation required and involved no specialized skill. On camera, the children appeared energetic and sociable, which undoubtedly made the show more entertaining. Being personable, however, is not a specialized skill that would indicate independent contractor status. Although they might have been coached by the Producers, no one has reported that the kids received any formal training for the show. This *Silk* factor also favors an employee-employer relationship.

5. Factor Six: Integral to Business Activities

The children's participation was the most integral part of the show. The show's purpose was to televise the behavior of children left to create a society of their own, so their participation—creating that society—must have been integral to the Producers' business operations. Without the children, there would be no show to produce. This factor also cuts in favor of a finding that the *Kid Nation* participants are employees.

For the foregoing reasons, all six *Silk* factors support a finding that the participants on *Kid Nation* were employees, as that term is understood under the FLSA. Application of the *Silk* test demonstrates that the children, for the forty days of production, were economically dependent on their

316. See *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060–61 (2d Cir. 1988) (holding that even where work forces are transient, workers can be deemed employees “where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative”).

317. *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054 (5th Cir. 1987).

employers. Recall that the correct economic dependence test “examines whether the workers are dependent on a particular business or organization *for their continued employment*’ in that line of business,” not whether the work provides a primary source of income.³¹⁸ The ultimate concern is whether the worker is in business for himself or herself, or depends on another for the opportunity to render service.³¹⁹ During their time on set, the children depended on CBS and Good TV for their continued employment in reality television, as there was no opportunity to provide their services elsewhere. Moreover, the children were not in business for themselves. In rendering their services, these minors fully depended on the Producers for the opportunity to render their services.

C. ARE THE *KID NATION* CHILDREN EXEMPT FROM THE CHILD LABOR PROVISIONS?

The *Kid Nation* participants likely performed work and were employees, so one final question remains: are they exempt as actors or performers? This issue relates to another major criticism of reality television: that not only are the settings contrived, but that there is nothing real or authentic about the participants’ behavior. Kilborn, a skeptic of participant authenticity, says that “the emphasis on performance is so strong that it becomes a moot point as to whether one can accurately describe [the shows] as reality- or actuality-based.”³²⁰ Networks and producers rarely admit that cast members are performing for the cameras since those who *are* considered performers would come under AFTRA’s jurisdiction.³²¹ Some critics also suggest that, like actors, participants are given instructions to react in certain ways and to read scripted dialogue.³²² While some networks and producers have admitted to instructing participants at times,³²³ they would never admit that this instruction renders

318. *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 265 (5th Cir. 1987) (quoting *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985)).

319. *See Mr. W Fireworks*, 814 F.2d at 1049.

320. KILBORN, *supra* note 228, at 75. *See also* Tom Shales, *Amateur Power: Novices Steal the Show as Television Plays Who Wants to Be a Star*, WASH. POST, Sept. 2, 2007, at M1 (“On reality TV, real people have mastered the art of faking it.”).

321. Michelle Tsai, *Are Reality-TV Actors Professional?*, SLATE, Aug. 23, 2007, <http://www.slate.com/id/2172697>.

322. *See* Fernandez, *supra* note 5. (“Producers have admitted to writing scenarios that contestants are asked to carry out.”); Posting of Barry Garron to Past Deadline, <http://www.pastdeadline.com/2007/08/kid-nation-coul.html> (Aug. 25, 2007) (“They are given instructions in what to do and what not to do, just like actors. . . . They are essentially doing the work of actors without being paid for it.”).

323. *See, e.g.*, Booth, *supra* note 227 (quoting a reality writer as saying, “[S]ometimes we just tell the contestants you’re mad, you’re happy, whatever. Act that way. And if they’re not getting it, we feed

participants actors, since doing so would effectively concede jurisdiction to SAG or AFTRA.³²⁴

Others, however, believe that participants' natural reactions and unscripted dialogue represent the only realness attributable to the genre.³²⁵ Andrejevic believes that participants' greatest contribution to these shows is their ability to "be real"—to reveal their authentic reactions and to just be themselves.³²⁶ Contrary to the beliefs of certain critics,³²⁷ some producers actually seek participants who will act authentically rather than play a part for the cameras.³²⁸ Because "sustain[ing] a character that isn't true to yourself, day and night . . . would drive you mad," Andrejevic believes that the "perpetual surveillance . . . reveals authenticity."³²⁹

Since the term performer in the child labor exemptions is broader than, and includes, actors, it is appropriate to ask only whether the *Kid Nation* children are performers under the actor or performer exemption. The federal regulations provide some assistance by defining a performer as someone 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 . . . 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.³³⁰

The *Kid Nation* children probably do not satisfy this definition. To begin, their work was not a "distinctive, personalized service." The roles of the forty children were in no way distinguishable. Everyone had the same

them a line").

324. Wyatt, *supra* note 6.

325. See Ogdon, *supra* note 27, at 30 ("After all, reality television shows all feature real people doing and/or talking about things that actually happen or are happening in reality."). See also Sharp, *supra* note 11, at 195 (noting the producers' limited ability to control participants' dialogue and natural reactions to otherwise controlled situations).

326. ANDREJEVIC, *supra* note 13, at 104.

327. See Holmes, *supra* note 58, at 18. Holmes says that "producers do not want 'ordinary people to behave like the amateurs they are,' but rather hope for the display of skills that professionals spend years perfecting." *Id.* (citations omitted).

328. See, e.g., ANDREJEVIC, *supra* note 13, at 104 (quoting a cocreator of *The Real World* saying that "[w]e don't want to turn these people into actors").

329. *Id.* See also Holmes, *supra* note 58, at 18 (noting that former *Big Brother* contestants, when asked, always said they were able to ignore the cameras and be their true selves).

330. 29 C.F.R. § 550.2 (2006) (emphasis added).

objective: to live “in a remote location for approximately forty days where they will form a community and live amongst themselves.”³³¹ No one was assigned a distinctive or personalized responsibility beyond the general task of creating a kids-only society.³³²

The definition continues that “distinctive, personalized services” include the work of actors, singers, dancers, musicians, and comedians.³³³ The kids danced, sang, and cracked jokes at times, but they were not dancers, singers, or comedians. Most importantly from that list, the children were not actors: they neither fit into the dictionary’s nor the entertainment industry’s definition of that term. Merriam-Webster’s Dictionary defines actor as “one who represents a character in a dramatic production.”³³⁴ The children never represented anyone but their true selves, and only their real names were used during the filming. Moreover, if they were considered actors by entertainment industry standards, SAG would have represented them.³³⁵ Forman, the man who created and produced *Kid Nation*, agrees that they were “not paid actors.”³³⁶

In addition, although the children “entertained, afforded amusement to, and occupied the interests” of an audience, it was not done *by* any of the activities that the CFR’s definition of performer requires: “acting, dancing, reading, narrating, performing feats of skill, or announcing.” Let us give acting the liberal meaning of behaving in an inauthentic or instructed manner. Nothing about the *Kid Nation* experience indicates that the reactions, dialogue, or behavior of the participants were inauthentic or scripted.³³⁷ The fact that some of them are aspiring actors³³⁸ does not mean

331. Participation Agreement, *supra* note 4, at 1.

332. The fact that the children were assigned certain titles throughout production—councilmember, merchant, laborer—should not make their service any more personal or distinctive, since those roles constantly changed throughout the season.

333. 29 C.F.R. § 550.2.

334. Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/actor> (last visited Mar. 30, 2009).

335. David Greenberg, *Creative Unions Line Up to Take a Shot at Reality Shows*, L.A. BUS. J., Mar. 7, 2005, at 5; Tsai, *supra* note 321 (“If the children on *Kid Nation* were treated as professional actors under [SAG] guidelines, most of them could only work nine hours a day, and that includes time for school or tutoring.”).

336. Salem, *supra* note 253. *But see* Fernandez, *supra* note 5 (noting that almost half of the children have expressed an interest in performing or acting). The fact that the children desire careers in entertainment, however, does not render their services on *Kid Nation* acting. *Cf.* ANDREJEVIC, *supra* note 13, at 106–07 (noting that in interviews with more than seventy-five aspiring *The Real World* cast members, almost all of them said that their main strategy for getting onto the show “was to be ‘open’ and ‘honest,’ and just ‘be themselves’”).

337. In fact, Forman claims he was “OK” with avoiding children from California and New York because “that’s where I thought we would find kids in the entertainment business, not the all-American kids we were looking for that I think viewers would relate to.” Fernandez, *supra* note 5.

that they were portraying anyone but their true selves.³³⁹

The argument that the children are not performers is bolstered by the fact that they are not members of AFTRA, the Hollywood union representing “performers but not contestants on reality shows.”³⁴⁰ AFTRA actually represents some reality participants—those it has deemed performers³⁴¹—like the contestants on *Last Comic Standing* and *Dancing with the Stars*.³⁴² The children who answer trivia questions on *Are You Smarter Than a Fifth Grader?* (“*Fifth Grader*”)³⁴³ and who sing on *American Idol*³⁴⁴ are also considered by AFTRA to be performers. The young participants on *Fifth Grader* and *American Idol* would also likely satisfy the FLSA’s definition of performer because the children on *Fifth Grader* “perform feats of skill” and the children on *American Idol* sing. Most reality participants, however, like contestants of *Big Brother* and the children on *Kid Nation*, do not enjoy AFTRA coverage. The following statement explains why: “‘We get calls from people wanting to know if (reality shows) are union,’ said Joan Weise, AFTRA’s national director of entertainment programming. ‘We do not consider what they are doing to be performing.’”³⁴⁵

The Supreme Court and the CFR require that any exemption from the FLSA’s child labor provisions be “narrowly construed” and only encompass “those plainly and unmistakably within its terms.”³⁴⁶ Because the *Kid Nation* participants are not plainly and unmistakably actors or

338. Fernandez, *Child Exploitation*, *supra* note 230.

339. Merriam-Webster’s Dictionary defines “acting” as “the art or practice of representing a character on a stage or before cameras.” Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/acting> (last visited Jan. 31, 2009). The eccentric, funny, and dramatic on-air personalities of the children were more likely a reflection of the type of people who aspire for careers in entertainment, and not the children’s attempt to “fake it” for the cameras.

340. Wyatt, *supra* note 6 (emphasis added).

341. Tsai, *supra* note 321.

342. *Id.*

343. Gigs List, *Are You Smarter Than a Fifth Grader?* Participant Application, <http://gigslist.org/index.php?name=News&file=article&sid=1093> (last visited Mar. 31, 2009). Fox posted a casting call looking for fifth graders for the show on May 2, 2007. In the description it reads: “Pay Rate: Aftra Scale.” *Id.*

344. David Lieberman, ‘*American Idol*’ Finalists Now Get Paychecks as Professionals, USA TODAY, Mar. 14, 2007, at 3B. Only *American Idol* participants who make the top twelve receive AFTRA representation. An AFTRA spokesman said that “the nature of . . . the show changes . . . Prior to that time, they’re just singing in a singing format . . . After that, they’re doing more interactions and set bits.” *Id.* (noting that because the top twelve contestants on *American Idol* went from “mere amateurs, the equivalent of game show contestants, to professional TV performers[,] . . . [t]hey became union members covered under contracts negotiated by [AFTRA]”).

345. Greenberg, *supra* note 335, at 5.

346. See *supra* text accompanying notes 212–13.

performers, as well as for the various reasons stated above, they should not be exempt from the Act's child labor provisions.

In sum, the work of the children on *Kid Nation* is regulable by the broad reach of the FLSA. Such a finding is consistent with the Act's general aim to eliminate substandard labor conditions across the country, as well as the goal of the child labor provisions to protect the safety, health, well-being, and schooling opportunities of young workers. Because the children performed work, were employees, and are not actors or performers, they should be afforded the rights and protections of the FLSA.

V. RECOMMENDATIONS AND CONSEQUENCES

A finding that the young participants on *Kid Nation* are regulable under the FLSA does not compel the conclusion that all future reality children are per se covered by the Act. The determination of a worker's FLSA coverage is fact sensitive. Reality television shows, while often exhibiting common characteristics, are hardly generic in production and formatting. That said, the previous discussion of *Kid Nation* could still illuminate certain truths about the genre and serve as a useful guidepost from which future cases determining FLSA coverage of reality participation can be decided. This part offers a brief set of recommendations for a court considering the FLSA status of a reality child. It then discusses some of the effects that FLSA coverage would have on producing a reality show.

A. RECOMMENDATIONS

The following recommendations can provide guidance to courts that, perhaps in the near future, might have to determine whether children on a reality show are covered by the FLSA.

1. Work

In only one situation is it conceivable that the service provided by a reality child—and by all adults too—would not amount to work: when the participant does not, prior to being filmed, knowingly or willfully agree to be part of the program. For example, individuals whose actions are captured on shows like *COPS* or *Candid Camera* are not working; their appearance is not required or supervised by an employer. Rather, their participation is coincidental and incidental to the crime-fighting and prankster functions of those programs. While their appearances will benefit networks and producers, their participation is not *pursued* for that purpose

because, well, it is not pursued at all. It is unanticipated and impromptu.

In all other situations, reality television participation (1) will involve physical or mental exertion (whether burdensome or not), (2) will be controlled or required by an employer, and (3) will be pursued necessarily and primarily for the benefit of an employer, thus constituting work under the FLSA.

2. Employee

The requirement of an express or implied compensation agreement for employees could present a major barrier to FLSA coverage. Before applying the economic realities test, a court would first have to determine whether such an agreement exists between the participant and the show's producers. If it does not, then there is no employment relationship.

The requirement that the work is for the advantage of the employer, on the other hand, should never present a barrier to FLSA coverage. A participant's services are always solicited for the primary advantage of networks and producers.³⁴⁷ Thus, if a sufficient compensation agreement exists, then a court should apply the economic realities test and the *Silk* factors to determine employment status.

a. Control

The control factor will typically cut in favor of an employee-employer relationship because in most shows, the right to control and the actual exercise of that control is substantial. "Although true-to-heart reality shows still exist and utilize a minimal contact approach between participants and the crew to capture the essence of reality drama,"³⁴⁸ those shows are few and far between. True-to-heart shows that passively follow cast members through the normal rhythms of their day-to-day lives—examples include *The Osbournes* and *COPS*—probably involve little on-set control. Thus, these are the only reality shows for which the control factor militates against a finding that reality participants, adult or minor, are employees.

b. Profit, Loss, and Investment

Participants often have opportunities to win large sums of money; however, that opportunity is typically controlled by producers and networks, rather than by the business judgment of the participants. Additionally, it is unlikely that a participant will ever have an opportunity

347. See *supra* Part IV.A.4.

348. Tiffany, *supra* note 10, at 31.

to lose money since they make no monetary investment in the show's production. These factors will typically cut in favor of an employee-employer relationship.

c. Permanence

Participating on a reality show for only one episode is not permanent enough to weigh in favor of an employee-employer relationship. But participating for an entire season—*Kid Nation* (forty days), *Survivor* finalists (thirty-nine days),³⁴⁹ *Average Joe* plaintiffs (ten weeks)³⁵⁰—should favor such a finding, especially when the seasonal nature of reality television is taken into consideration. But when the length of participation falls somewhere between one episode and one season, this factor is probably not amenable to hard and fast rules and may require a look at the totality of the circumstances.³⁵¹ This factor could be a major barrier to FLSA coverage, particularly for participants who appear in only one or two episodes.

d. Skill

This Note argues that what constitutes work on a reality show is a participant's mere appearance on that show, not the particular activities carried out while being filmed. Therefore, the skill factor should usually not limit a finding of employee status since no specialized skill or training is required to "be yourself."

e. Integral to the Show

As noted several times, a participant's role will always be integral to a show's production. Without the real people who offer their services, there would be no reality television genre. This factor should always weigh in favor of finding an employee-employer relationship.

3. Actor or Performer

The actor or performer exemption presents another potential limitation to FLSA coverage, but the assumption that all children appearing on television are exempt must be revisited. Reality children will often not fit the Act's definition of actor or performer. For instance, when a child's

349. *Id.* at 20.

350. Chammas, *supra* note 225.

351. This presents an interesting question: on elimination shows, should permanence be based on the prospect of an individual's season-long participation or on the actual amount of time spent on the show? *See, e.g.*, Seelig v. Infinity Broad. Corp., 119 Cal. Rptr. 2d 108, 111 (Ct. App. 2002) (noting that the plaintiff was a contestant on *Who Wants to Marry a Multimillionaire?*, but her "total participation in the television broadcast lasted less than one minute.").

behavior, reactions, and dialogue are natural and authentic, a court should not label that child an actor. Conversely, if the children are fed lines, instructed on how to react to certain situations, or commonly asked to reshoot scenes, they might fit the definition of actor.³⁵² A court would have to inquire whether the degree of inauthenticity renders the behavior acting.

A child participant will also be exempt if he or she is a performer. While not legally binding, courts could follow AFTRA's decisions on which reality children are performers. Hollywood unions like AFTRA attempt to bring as many individuals as possible under their jurisdiction, so there should be little concern that AFTRA's definition of performer will be narrower than the FLSA's.

B. CONSEQUENCES

A finding that child participation on a reality program is regulable under the FLSA will have a major impact on who producers and networks can hire, how the show is produced, and when the children can participate. First, all children fourteen years old and younger would be prohibited from participating. Second, in order for fourteen- and fifteen-year-olds to participate, the Secretary of Labor would have to find that such participation does not interfere with their well-being or the employers would have to comply with the various limitations placed on employing fourteen- and fifteen-year-olds. And in the event that the Secretary permits the participation, the children would only be allowed to work specified and limited hours.³⁵³ Third, all minors would be prohibited from activities deemed "particularly hazardous."³⁵⁴ Finally, FLSA coverage would guarantee that reality children receive the Act's minimum wage and overtime protections. FLSA coverage would not supplant state child labor

352. MTV's massively popular reality show *The Hills*—which follows young socialites around Los Angeles—has recently faced allegations that scenes, dialogue, and conflicts are preplanned and scripted by producers. See Show Tracker: What You're Watching, <http://latimesblogs.latimes.com/showtracker/2007/10/the-hills-fake-.html> (Oct. 31, 2007, 12:23 PT). If the show is proven fake, child participants on *The Hills* and other shows employing similar tactics may be exempt from FLSA coverage as actors or performers.

353. For the specific time periods for which these children could work, see 29 C.F.R. § 570.119 (2006). The hours worked on *Kid Nation* would have clearly been in violation of these hours regulations.

354. For a discussion of hazardous occupations, see *supra* text accompanying note 196. While beyond the scope of this Note, whether participation on *Kid Nation* was particularly hazardous is a very interesting legal question. The Participation Agreement does warn that "the Program may take place in inherently dangerous travel areas that may expose the Minor and other participants to a variety of unmarked and uncontrolled hazards and conditions that may cause the minor serious bodily injury, illness, or death." Participation Agreement, *supra* note 4, at 3.

laws that are more protective than the federal regulations. FLSA coverage would, however, force employers who may want to film in states with lax child labor laws to comply with the federal standards.

A finding that a reality child is covered by the FLSA is not inconsistent with the purposes of the Act's child labor provisions: "to protect the safety, health, well-being, and opportunities for schooling of youthful workers."³⁵⁵ Limiting hours, banning hazardous activity, and properly compensating these children would undoubtedly help protect their safety, health, and well-being. Moreover, and perhaps most important to the reality television context, FLSA coverage protects a child's educational opportunities. Participation on *Kid Nation* required the children to miss several weeks of school,³⁵⁶ and no tutors were on set.³⁵⁷ Because reality children are typically not represented by SAG³⁵⁸ or AFTRA, without FLSA protection, they would have to rely on state education laws. As seen with *Kid Nation*, state law does not always protect the best interests of children in the entertainment industry.

VI. CONCLUSION

After the debut of *Kid Nation*, much of the controversy died down, presumably because the episodes lacked the shocking child abuse that critics may have expected. The footage that CBS and Good TV decided to televise, however, is immaterial if the facts surrounding the children's participation support FLSA coverage.³⁵⁹ Much has been learned about the circumstances under which *Kid Nation* was filmed, providing a good opportunity to begin discussing whether child participation on reality

355. 29 C.F.R. § 570.101.

356. See, e.g., Fernandez, *supra* note 5. Some critics have complained about truancy issues too. In reaction to *Kid Nation* Producers pulling the kids out of school for forty days, Anne Henry, an advocate for child actors, said, "[I]n no state in this country is it legal for a parent to remove their child from school for a lengthy period of time just because they want to." Fernandez, *supra* note 72.

357. Fernandez, *supra* note 72. Forman said that parents had to arrange with their children's schools to make up missed work. *Id.* One twelve-year-old girl said she missed nineteen days of school and had to "un-enroll . . . and then re-enroll, so I didn't have to make up any work, which was awesome." *Id.*

358. SAG requires the producer to provide a teacher if a child is working three or more consecutive days. Screen Actors Guild, Education is Job One, <http://www.sag.org/content/education-job-one> (last visited Mar. 30, 2009). In a statement about *Kid Nation*, SAG said, "Had the children been engaged under SAG contracts, they would have had protections including maximum daily work hours based on their age, minimum compensation, supervision and instruction on the set from qualified teachers, and 15 percent of their gross earnings placed in a blocked trust." Lauren Horwitch, '*Kid Nation*' Calls Reality TV into Question, BACK STAGE, Sept. 13, 2007, http://www.backstage.com/bsa/news_reviews/multimedia/article_display.jsp?vnu_content_id=1003640312.

359. See Collins, *supra* note 7.

television is regulable under the FLSA. The opportunity for this discussion is ripe because reality television, and likely its use of children, “will be a major part of television programming around the world for the foreseeable future.”³⁶⁰ Tackling the issue now can set an important precedent that will prevent future FLSA violations.³⁶¹

CBS had plans to follow up with a second season of *Kid Nation* and even announced casting calls for it.³⁶² The network and producers hinted that they might film the second season outside the United States, perhaps to avoid scrutiny from state or federal authorities.³⁶³ A second season was never filmed and it remains unclear whether *Kid Nation* will ever return to television.³⁶⁴

Even if *Kid Nation* never airs again, another child-centric reality show has already followed its lead. *Baby Borrowers*, which first aired on NBC in June 2008, tested the parenting skills of teenage couples considering parenthood. Each couple was given an infant to look after, and then a toddler, a preteen, a teenager, and a senior citizen, all in three-day increments.³⁶⁵ The executive producer claims that his show was safer than *Kid Nation*, but *Baby Borrowers* is similar to *Kid Nation* in that it was filmed in a state with lenient child labor laws: Idaho.³⁶⁶ Consistent with Forman’s statements about the legal status of the children on *Kid Nation*, the creator of *Baby Borrowers* has said, “We weren’t employing them. It was totally voluntary.”³⁶⁷ Clearly, if children continue to appear on reality programs, networks and producers will continue to treat them as if they are

360. Escoffery, *supra* note 25, at 3.

361. See Fernandez, *supra* note 72. “We don’t want to see one production break every rule in the book . . . and see them get away with it because we know it’s a slippery slope and our kids will be hurt in the end,” said Henry. *Id.*

362. Cbs2, *Kid Nation Season 2 Open Call Information* (Jul. 30, 2007), <http://cbs2.com/misc/Open.Call.Information.2.533995.html>.

363. ‘*Kid Nation*’ *Season Two*, BACK STAGE, Sept. 20, 2007, at 33 (noting that the application for season two requires children to have a valid passport). When asked if the show would be relocated to another country, Forman said, “Nothing is off the table.” *Id.*

364. See TV Series Finale, CBS Announces Their 2008–09 Schedule. Who’s Been Cancelled? (May 14, 2008), <http://tvseriesfinale.com/articles/cbs-announces-their-2008-09-schedule-whos-been-cancelled>.

365. James Hibberd, *NBC Nurses Reality ‘Baby Borrowers,’* TV WEEK, Sept. 2, 2007, http://www.tvweek.com/news/2007/09/nbc_reality_baby_borrowers.php. The original version of the show caused a furor in the British media, including accusations of mistreatment and inherent danger. *Id.* The producers required that the infants be at least six months old and have previously experienced some separation from their parents. *Id.*

366. *Id.* Producers admit that labor laws were a factor in choosing to film in Idaho. *Id.* Like in New Mexico, the Idaho Department of Labor and the state legislature considered updating their child labor statutes only after the show’s production. *Id.*

367. *Id.*

not employees.

The DOL says that it is constantly reviewing the child labor scene in America for “the emergence of new types of businesses where young workers may find employment opportunities.”³⁶⁸ In light of *Kid Nation* and *Baby Borrowers*, it appears that reality television has emerged as a new type of business that is ripe for federal scrutiny.

368. 1 ABRAHAMS ET AL., *supra* note 204, ¶ 720.