

CHILDREN IN REALITY TV: COMPARATIVE AND INTERNATIONAL PERSPECTIVES

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INTRODUCTION

In 2007, a juicy scandal broke out involving a new daring reality program by the Columbia Broadcasting System (CBS) network, *Kid Nation*, which may have crossed social and legal lines, as well as those of good taste. The program combined children, who always “steal the show,” commercial companies, “heavy” advertisers, and lawyers—a winning media mix. *Kid Nation* joined the ranks of other reality programs aired on television, in which children participate either by themselves or together with adults. On the show, forty children aged eight to fifteen were taken out of their schools in the middle of the academic year in order to erect a city and manage it without any adults present (as the trailer promised). The children were shown, among others, in their weakness. But not all reality programs are this extreme. Not all of them vote off children. Not all of them broadcast difficult images of children in irregular situations. Not all of them achieve fame at any price.

And yet, there are those who harshly criticize programs that are less extreme than *Kid Nation*, if only because they consist of children entertaining adults, who are the main consumers of these programs. The shows are broadcasted during the peak evening viewing hours, which gives rise to the potential for severe and extensive damage to children who participate in these shows.¹ Note that the problem is not only American,²

1. See Hilary Levey, *Balloon Boy Plus Ei8ht? Children and Reality Television*, CONTEXT 72, 74

and reality programs with child participants are criticized in other countries as well.³ Although other shows may be more tepid in form than *Kid Nation*, many serious concerns are common to all reality shows involving children. This Article compares different legal regulations, mostly French and British, to determine whether regulation, or even complete prohibition, on child participation in these programs is necessary.

The connection between children and television in general is not necessarily negative. It is less worrying when children participate in children's programs or in programs with educational messages, like *Sesame Street*. Today, however, children participate with increasing frequency in reality programs and various game shows, most of which are intended for adult or family viewing. In some cases, children participate in reality programs together with adults; in other cases, they participate in reality programs unique to them—usually after a similar format was successfully tried with adults. These programs vary from cooking to survival programs. It often appears that television channels take advantage of children and their parents, whose desire for fame blinds them to the implications of high participation costs in reality TV shows, especially the psychological impacts. But this is not to say that such shows must be completely prohibited. We must also consider the right to freedom of expression for children and media organizations, as well as the commercial freedom of speech. But there exists little legislation concerning the matter in the U.S. or elsewhere, and what legislation does exist usually only covers labor law.

Kid Nation will provide the first reality show prototype, but in order to present a balanced model, two other prototypes will be used to discuss the issue. As described in the show's trailer, forty children, aged eight to fifteen, were taken in the middle of the school year to a place named Bonanza City, also known as Bonanza Creek Movie Ranch, in the New Mexico desert near Santa Fe. In the nineteenth century, adults had failed to erect a city in this place, leaving behind a ghost town.⁴ The children's goal

(2010).

2. See, e.g., Christopher C. Cianci, Note, *Entertainment or Exploitation? Reality Television and the Inadequate Protection of Child Participants Under the Law*, 18 S. CAL. INTERDISC. L.J. 363, 363 (2009); Courtney Glickman, Note and Comment, *Jon and Kate Plus . . . Child Entertainment Labor Law Complaints*, 32 WHITTIER L. REV. 147, 148 (2010).

3. See, e.g., Ariana Melamed, Master Class 2 *Big Winner*, *Discordant Tones*, Y-NET (March 20, 2013), <http://www.ynet.co.il/articles/0,7340,L-4358671,00.html> (harshly criticizing the Israeli show *Master Class*, a singing and talent competition for young children guided by well-known singers, which was broadcast on Israel's Channel 2 in 2013 and received rather high ratings).

4. For the trailer, see CBS, *Kid Nation Trailer*, YOUTUBE (May 23, 2007), <http://www.youtube.com/watch?v=UtdO665FxA>. See also Levey, *supra* note 1, at 72; Polly Summar, *New Law Protects Young Actors*, ALBUQUERQUE J. (July 18, 2007), available at <http://www.abqjournal.com/news/state/>

was to stay at the filming site for a period of six weeks and erect a town there: Kid Nation. The children did everything; they managed the town through a council, cooked, cleaned, and even managed a supermarket and a saloon where root beer was sold. In return, each child received \$5,000, which the producers claimed was a stipend rather than a salary. The children were divided into groups that competed for class division in the town, from the upper class to the laborer class. They were assigned missions by the production team, which required knowledge, skill, and speed, such as obtaining photographs of United States presidents and arranging them chronologically. The winning team became the highest class in the city and won old American coins. If all the groups succeeded in completing the missions assigned to them, the town council chose a surprise bonus, such as hamburgers, hygiene products, or other essential items otherwise unavailable in the town. The most outstanding child in the program, based on the decision of the town council, won a “golden star” worth \$20,000.

All activity was filmed. But several scandals, which at their core involved serious legal problems, cast a heavy shadow on the broadcasting of the first season in 2007, and on the filming of the second season. An eleven-year-old girl was burned when heating cooking oil, and some boys were injured after drinking a cleaning product from an unlabeled bottle.⁵ According to the press reports, a mother of one of the participants filed a complaint against CBS.⁶ The newspapers discussed the validity of a section in the contract, signed by the parents with CBS, that purported to prevent parents from suing the network in any case regarding the nature and success of medical care given to the children, or for any matters such as emotional damage, pregnancy, being infected with AIDS, or death.⁷

579151nm07-18-07.htm; Polly Summar, *Kids Reality Show Set in New Mexico*, ALBUQUERQUE J. (May 18, 2007), available at http://www.abqjournal.com/north/563859north_news05-18-07.htm; Edward Wyatt, *A CBS Reality Show Draws a Claim of Possible Child Abuse*, N.Y. TIMES (Aug. 18, 2007), <http://www.nytimes.com/2007/08/18/arts/television/18kid.html>. Some scenery from Westerns filmed at the location remains at the site. See *id.* There are other reality programs with child participants, such as *Jon & Kate Plus Eight*, *Toddlers and Tiaras*, *NYC Prep*, *My Super Sweet 16*, *18 Kids and Counting*, and *Table for 12*, and, in some cases, family life is documented and the family’s children are exposed for the length of a few seasons, such as *Bug Juice*, *Jon & Kate Plus Eight*, and others. Some of these programs are discussed in this Article. See Levey, *supra* note 1, at 72. In addition, MTV created *Laguna Beach*, a program documenting the lives of wealthy and attractive teenagers in California, and The N channel, which targets a younger audience but is also part of MTV, broadcasts the program *Best Friend’s Date*, which documents teens on blind dates.

5. Levey, *supra* note 1, at 72.

6. Edward Wyatt, *Kid Nation Parents Gave Show Free Rein*, N.Y. TIMES (Aug. 23, 2007), <http://www.nytimes.com/2007/08/23/arts/television/23kids.html>.

7. *Id.*

According to reports, the contract also included a breach of confidentiality clause amounting to \$5 million of agreed-upon compensation.⁸ Moreover, according to the contract, the producers had the right to make major medical decisions by themselves, including whether to perform surgery on the children, with only the parents' prior blanket consent.⁹

Kid Nation and other similar shows raise some instructive and interrelated issues, including matters of ethics, privacy, freedoms of expression and speech, child labor, and more.¹⁰ In light of the massive upsurge of reality programs in general, as well as of those with child participants, regulation of the field is not only a burning legal issue but an important social and cultural one as well.

In the past few years, an increasing number of children of various ages have appeared on different advertisements and in different programs. Seemingly, this is a reason for celebration among advocates of children's rights because media attention to children possibly reflects greater societal attention being paid to this disadvantaged group than in the past, thus creating greater awareness for children and their rights. But the use of children in television may also amount to exploitation by television networks and advertisers, reflecting a voyeurism that brings more viewers and shoppers. Some parents are greedy for money and fame, for themselves or for their children,¹¹ and others are willing to pay almost any price for a solution to family problems, even subjecting the family to negative public attention by filming the family at its worst. Children are supposed to bring greater emotion and identification, attract audiences, and increase ratings. These are not cases in which children are being filmed without their parents' consent. Usually, the children and their parents have signed a contract securing their consent to the broadcast, its editing, re-runs, and more. This situation is cause for concern at the social level and requires solutions from a legal perspective.¹²

8. *Id.*

9. Tinnin Law Firm, *Take 2: New Mexico's Child Labor Laws Updated*, 13 N.M. EMP. L. LETTER 10 (Oct. 2007).

10. See ANNETTE HILL, REALITY TV: AUDIENCES AND POPULAR FACTUAL TELEVISION 133 (2005) ("[E]thics are at the heart of reality programming. Rights to privacy, rights to fair treatment, good and bad moral conduct, and taste and decency are just some of the ethical issues that arise . . .").

11. Katherine Neifeld, *More Than a Minor Inconvenience: The Case for Heightened Protection for Children Appearing on Reality Television*, 32 HASTINGS COMM. & ENT. L.J. 447, 459–60 (2010); Dayna B. Royal, *Jon & Kate Plus the State: Why Congress Should Protect Children in Reality Programming*, 43 AKRON L. REV. 435, 448–49 (2010).

12. See, e.g., Joel Michael Ugolini, *So You Want to Create the Next Survivor: What Legal Issues Networks Should Consider Before Producing a Reality Television Program*, 4 VA. SPORTS & ENT. L.J. 68, 69–70 (2004); Jennifer L. Blair, *Surviving Reality TV: The Ultimate Challenge for Reality Show Contestants*, 31 LOY. L.A. ENT. L. REV. 1, 1 (2010–11).

An important question is whether one should be satisfied with “soft” regulation of the field, such as agreements and conventions that are valid only at a contractual level, or seek more severe and sweeping intervention by legalizing the field in order to give those instructions and guidelines binding validity. The objective of this Article is to lay down a basic legal basis for agreements or for legislation of this matter in order to prevent damages to children and to obviate lawsuits. At the same time, this Article can also serve as a basis for possible lawsuits and provide a certain amount of protection from such lawsuits.

The importance of this Article lies in the attempt to regulate a wide-open field that is currently not sufficiently regulated and was formed from the shards of various legal fields. Some of these fields, such as labor law, contract law, torts, or children’s rights, are regulated to some degree, but such regulation is not current or extensive. The literature does not usually regard reality shows in which children participate as a separate and distinct genre, and the literature does not focus on the financial, legal, and psychological consequences that ensue when children participate in these shows.¹³ This Article’s goal is to present a balanced and practical model based on theoretical, distributional, and deterrent thinking that is centered on the welfare and rights of children. If left unprotected, these rights may be severely harmed by the practices of the broadcasting companies and by the aspirations of parents with misplaced priorities, who are after fame and money and often do not concern themselves with the welfare of the children. However, society has a greater responsibility than simply protecting children from parents tempted by fame and money; society must also help parents overcome these human biases at their roots by creating a regulatory regime that induces networks and parents to be more careful. The United States has a long history of developing children’s rights and of protecting workers from exploitation.¹⁴ Regulating children’s participation in reality shows, thus developing children’s rights and protecting said children from worker exploitation, is the next and natural step in this direction.

Part I presents three prototypes of reality programs as a practical basis for discussion and demonstration. Part II presents the main dilemmas concerning children participating in reality programs, and compares American legislation and regulations with those of France and Britain. Part III proposes a model based on the legitimacy of child participation in reality programs, but only in accordance with certain qualifications and

13. See, e.g., Levey, *supra* note 1.

14. See *infra* Part III.E.

parameters. This model is recommended as a basis for regulation at the level of a unified ethical code for all broadcasting networks in the first stage. After several years, legislators should reexamine the situation and decide whether to enact a law on this matter. The model recommends a cluster of several solutions for solving the basic dilemmas from different perspectives.

I. THREE PROTOTYPES OF REALITY PROGRAMS WITH CHILD PARTICIPANTS

To illustrate the typical dilemmas of child participation in reality programs that will be discussed in further detail in Part III, three prototypes of reality programs with child participants will be described: (1) child talent competitions, (2) *Nanny 911*: guidance for parents raising their children while watching family therapy in real time,¹⁵ and (3) CBS's *Kid Nation*: a type of *Survivor* for children,¹⁶ in which children erect a town and manage it largely independently of adults.¹⁷ Clearly, within the framework of this Article it is not possible to expound on each prototype. But in their presentation, some of the dilemmas that are characteristic of each prototype will be illustrated. These dilemmas make it possible to look for practical, tangible, and not just theoretical solutions. After a foundational regulatory scheme has been created, it will be possible to adapt to additional prototypes.

A. Talent competitions

Children's talent competitions are nothing new. Such competitions have been filmed and broadcast on television many times, in the form of music competitions, trivia quizzes, and so on. In this type of reality program, maybe the oldest of the existing formats, participants compete against one another (or, sometimes in groups) for a prize. They usually compete under pressure, faced with the threat of elimination, which increases both drama and ratings.

Among these are programs such as *America's Got Talent*, broadcasted by the National Broadcasting Company (NBC) since 2006, and the

15. A similar program exists in England, entitled *Little Angels*, where the caretaker is a psychologist. See Peter Lunt, *Television, Public Participation, and Public Service: From Value Consensus to the Politics of Identity*, 625 ANNALS AM. ACAD. POL. & SOC. SCI. 128, 134–35 (2009).

16. A children's survivor show was also broadcast on MTV, entitled *Montana Boys vs. Girls*.

17. The prototypes were set up only in order to present a balanced model. There are debates regarding the sub-divisions of reality programs, and there is no intention here of presenting a different division. Moreover, we are only discussing reality programs with child participants, and the traditional divisions include all reality programs.

program *Britain's Got Talent*, broadcast in England since 2007. In these programs, participants of various ages compete in a talent competition across diverse fields such as music, dance, humor, and magic. U.S. contestants compete for a million dollar prize and the opportunity to perform solo for a large audience. In the British version, the prize is hundreds of thousands of pounds and the opportunity to perform before the Royal Family.

Children may be charming and captivating, but they don't have the natural advantage of knowledge, physical ability, and emotional stability to withstand hardships and failure as adults do. The viewers, as well as the children's families, develop expectations about talented children. When children fail, they often leave the stage embarrassed and humiliated; when the camera stops following them, one cannot know what damage they have sustained from their public failure and from their brief appearance for which they may have labored for many months. The judges disqualify contestants with the single press of a large button labeled "X." In both the American and British versions of the show, if three judges press the button, the contestant must immediately stop performing, even if he just began.

This type of program is not filmed constantly; contestants are only seen before, during, and after their performances. Thus, there is less of an issue of manipulative editing by the broadcasters or of filming the participants in especially intimate moments. But, the pressure can be very intense for children because voting occurs immediately after their performance, leaving them no opportunity to correct anything or to display their skills later, unlike programs where they are filmed over a long period of time. Filming behind the scenes, both before and after a child's performance, adds to the pressure. These scenes may show the children in especially embarrassing moments of pressure, or releasing pressure and feeling relief. A child's ignorance of exactly what will be broadcast may make them do something potentially embarrassing backstage and fret over the hope that it will be edited out. As far as the public is concerned, these shows are disposable entertainment. Contrary to the other prototypes to be presented below, it is difficult to argue that the public benefits from these programs in any way except as momentary pleasure.

With children and adults competing together, as is typical of many reality talent shows including *America's Got Talent*, such programs are aimed at the entire family, which increases the number of viewers, the ratings, and the advertisement value of the show. In other programs, such as *MasterChef Junior*, only children participate. Some of these programs are not eliminatory and there is no "voting off" during the filming. The staff chooses a team, and the team is filmed from beginning to end. The

only elimination occurs before the finals. Only outstanding children participate in the finals or semi-finals; the rest do not go on despite their great achievements, and at this final stage the winners are declared.

B. Helping parents with childrearing by viewing family treatment in real time

Programs about helping parents in real time after viewing a family, in which everything has been documented and prepared for broadcast, have been shown in the Western world for several years. In *Nanny 911*, a nanny is asked to come to the participants' problematic family home. Usually the parents make the request, but in some exceptional cases, the children seek the nanny's help. In the beginning, the nanny watches the family, builds a picture of the situation for herself, and maps out problems. During the processing and editing of filmed materials, additional insights, not raised in real time, are added to the broadcast. At this stage, the audience usually sees a family with difficult problems of various types, such as lack of communication between parents and children, hurtful and harsh treatment of the children, temper tantrums thrown by the parents and children, or lack of parental control.

The nanny comes up with a plan to change the home situation. She first presents the plan to the parents and then presents a consolidated plan to the rest of the family. At this point, the nanny leaves the family to its own devices for about a week. She later returns a second or third time, after viewing films of the family's behavior taken while she was not physically present. The family continues to be filmed when the nanny is not present, and the production team chooses which of these scenes is broadcast. Usually audiences see only a few segments, some of them extreme, showing either lack of change or dramatic change. These segments purport to indicate that this was the situation during the entire time after the nanny left the family. In her subsequent meetings with the family, the nanny tries to polish and preserve what has already been achieved and gives the family advice on how to improve based on the information gleaned from the filming that took place in her absence. After a few additional meetings, which are spread out over a few weeks, the nanny leaves the family. In almost all cases, incredible progress is shown over a short period, and the family is instructed to try and maintain the progress. Occasionally, at the end of a season, the show returns briefly to these families to examine what solutions continue to be implemented.

These programs have the benefits of teaching viewers how to solve family problems and how to be better parents. Some of the content is educational, regardless of whether the viewers have similar problems or

whether they have a family. One of the most obvious problems with these programs is the fact that the solutions do not conform to all the complexities of family life. There is also a possibility that the solutions will not be applied properly. Moreover, the show presents an illusion that short-term therapy always works because immense improvements are shown within one or two days, and almost all problems are resolved within a week or two.¹⁸ As with cases of serious weight loss, it is necessary to maintain the progress made, which is not at all simple. It seems that the intensity of the invasion of privacy and the rapid pace at which these changes are occurring are not always best for the children. Furthermore, after filming, the family is not always guided by professionals associated with the program. The situation can easily deteriorate and spin out of control, especially if the family has become dependent on the nanny and the structure provided by the show. The solutions the family was given may not work after a while.

Unlike the first prototype, a child's consent is not required for this type of program. The parents' consent is sufficient, and they are usually the ones who requested the show's services. The children, and often the parents, are portrayed in their moments of weakness and in times of difficulty, such as crying, cursing, temper tantrums, and the like. Classmates of the children participating in the show may ridicule them, causing emotional damage, especially if re-runs of the show are broadcast, or if it is possible to watch the show repeatedly online, with viewers potentially being able to watch the show many years later. Even trailers, which usually show the loudest and most provocative segments, may be widely viewed. A trailer portraying a girl cursing at her father, a boy hitting his mother, or parents yelling at their children or hitting them is more likely to convince people to watch a show, even if such abnormal behaviors or temper tantrums are not typical of the family routine. Thus, episodes of extreme behavior receive more limelight, even if the broadcast may have been successful without them.

C. Competitive challenges: children's survival

The last prototype includes programs focused on competitive challenges for children, such as *Kid Nation* on the CBS network, or *Boys and Girls Alone* on British Channel 4.

These programs, in the style of *Big Brother* or *Survivor*, follow one or two groups of contenders around the clock, both during the challenges and

18. See, e.g., Lunt, *supra* note 15, at 135 (describing rapid behavioral transformations made by children in *Little Angels* when parents were coached by a psychologist).

at other times. The contenders are usually isolated: a deserted island in *Survivor*, a remote villa in *Big Brother*, or an isolated location in *Kid Nation*. Here, the contestants are not only pitted against each other, as they are on talent shows, but also teamed up with one another to test interpersonal skills and create group competitions. The contestants are filmed in moments of glory and weakness, in situations of mutual support and those full of intrigue and scheming. At the end of the program a large prize is awarded, which is usually a monetary prize or a coveted job. Success is measured over time, and viewers develop feelings of identification or antagonism towards other participants in the course of the season. The winner becomes a celebrity, a cultural hero. Many viewers begin watching the show as they hear about the program from friends, family, coworkers, and the media, and many are affected by the language and experiences of these programs even if they do not watch them. Often there are scandals associated with these programs, which are eagerly anticipated by program advertisers and immediately spread over the Internet.

Kid Nation was described above in the introduction to this Article. *Boys and Girls Alone*, which was broadcast in February 2009 on British Channel 4, was a survivor program for twenty children—ten boys and ten girls, aged eight to twelve—who were expected to survive for two weeks without any adults.¹⁹ The children were divided into two campuses: one for boys and one for girls. They were given various assignments related to daily routines, such as cooking, cleaning, and budgeting. The gender separation was supposed to serve as a basis for comparisons and examinations of each group separately. Channel 4, which produced the program and broadcast it, described the program as one that examines how children behave in a world without adults. During the third episode, the children left the campuses on a camping trip in which they had to perform certain survival tasks such as hunting and cooking animals for food. It was unclear whether there was any adult supervision. During the second episode, the narrator noted that throughout the entire broadcast the children are watched by supervisors and chaperones who intervene if there is any danger to the children's safety, but in the third episode the narrator noted that they will also get involved if the children's welfare, not just their safety, is at risk.

19. OFFICE OF COMM. (U.K.), BROADCAST BULLETIN NO. 144 5 (2009). The description is taken from the Ofcom report of October 2009, following claims that the code had been violated. OFFICE OF COMM (U.K.), OFCOM BROADCAST BULLETIN, ISSUE NO. 144 5–39 (Oct. 26, 2009), <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb144/Issue144.pdf> [hereinafter 2009 BROADCAST BULLETIN]

The Office of Communications (Ofcom), the U.K. regulator for television and radio, received many complaints about the content presented in the program, from people worrying about child abuse to viewers complaining that they had been hurt by the content of the broadcast.²⁰ Among others, it was claimed that the program was a pointless experiment on children, that it did not provide the viewers with any knowledge or content of value, and that the production had no concern for the interests or welfare of the children in the program.²¹ Viewers were especially against the broadcasting of scenes that portrayed physical and verbal violence between the children.²² Many of the complaints were concerned with the children's physical and emotional wellbeing, and with the fact that the children were not being accompanied properly before, during, and after the program.²³ There were those who claimed that the production team deliberately created uncomfortable and potentially harmful situations in order to raise the ratings of the program at the expense of the children.²⁴ Among the complaints, they claimed that the older girls emotionally harmed the younger girls when they drew graffiti implying that the house was haunted by the ghost of a little boy, which caused some of the younger girls to cry and react in fear.²⁵ It was further claimed that there were scenes of bullying in the boys' campus. There was real fear for the children's safety because there were dangerous objects around the areas where the fighting occurred, such as knives and sharp gardening tools.²⁶ Furthermore, children were shown complaining of hunger because they did not know how to cook and therefore did not eat.²⁷ Two children wanted to leave the program during the first episode, but the producers pressured them into staying by having their mothers come to the studio to persuade them to stay, among other methods.²⁸ Despite these attempts, one of the boys still wanted to leave and locked himself in a room until he was eventually allowed to leave with his mother's permission.²⁹

The trailer for the next episode showed a fight within the boys' group, and two girls were shown smoking cigarettes.³⁰ In the third episode, the

20. *Id.*

21. *Id.* at 6.

22. *Id.* at 6-7.

23. *Id.*

24. *Id.* at 6.

25. *Id.* at 7.

26. *Id.*

27. *Id.* at 7-9.

28. *Id.* at 7-8.

29. *Id.* at 7-9.

30. *Id.* at 8.

viewers were informed that the cigarettes were not real.³¹ It turned out that the producers had given the children money to shop at the mall in order to examine how they would manage a budget and prioritize their spending.³² The children wasted their money on game machines and purchased fake cigarettes.³³ The episode shows peer pressure for “smoking,” with girls who did not want to “smoke” at first ending up doing so.³⁴ Later in that episode, a fight broke out among the children, with one child trying to run another one over with a bike, and one boy waving a knife and making stabbing motions in the air.³⁵ The children excluded the boy who had waved the knife from the group.³⁶ Subsequently the boy met with his parents, and, following a conversation with them, apologized to the other children in the boys’ campus.³⁷ The boys agreed to take him back only if he obeyed their every command.³⁸ The following episode, a camping episode, included survival in the wild.³⁹ The children went camping and were supposed to manage by themselves in the field.⁴⁰ During the episode, the children were forced to skin and cook animals that had been killed, such as chickens and rabbits, which caused emotional distress to some of them, although they performed these tasks.⁴¹ During this episode there was also verbal violence among the girls.⁴²

Following many complaints, Ofcom intervened and asked the channel and the production team to clarify whether it was necessary to present the children in moments of stress and scenes of bullying and violence.⁴³ Ofcom also requested clarification regarding claims of potential physical and emotional damage to the children’s wellbeing and safety caused by the program.⁴⁴ Ofcom accepted most of the channel’s explanations that no damage was caused to the children’s wellbeing,⁴⁵ although Ofcom believed that the viewers, who were not aware of the many safeguards used behind

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 8–9.

38. *Id.* at 9.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 6–7.

44. *Id.* at 10.

45. *Id.* at 9–16.

the scenes and of the chain of professionals accompanying the program, were harmed by the program.⁴⁶ Regardless, a broadcast of this sort seems to create a great deal of discomfort.

Kid Nation seems to have crossed all boundaries without any clear benefit,⁴⁷ with the possible exception of its occasional portrayal of children as competent individuals even in the absence of adults. Almost every aspect of the program is problematic. There are potential tort claims for neglect and child abuse, along with potential criminal claims. Does leaving children, some of whom are very young, without adult supervision for such a long period of time constitute a case of use (and perhaps even abuse by omission) and neglect of children, both by the parents and the network, for promotional purposes? To soothe the public and stave off potential lawsuits, CBS revealed that there were adults present behind the scenes at all times, including psychologists, paramedics, pediatricians, and even cooks.⁴⁸ But after issuing that report, CBS fell into a trap: how could it continue showing a trailer stating that the children are erecting a town by themselves with no adults present? And if it is not really a children-only town, is the program giving viewers what it promised them?

A large part of the debate about *Kid Nation* focuses on labor laws and child employment. According to reports, the contract that CBS had with the parents stated that the relationship between the network and the children was not one of employer and employee.⁴⁹ That is, no labor relations apparently existed between the parties, and the sums given to the children were not for work. Many criticized this characterization,⁵⁰ and the children themselves described a relationship that seems to be one of employment.⁵¹ Apparently, Tom Forman Productions did not choose the show's location randomly, as New Mexico has less stringent child labor laws.⁵² The producers called the site a "summer camp,"⁵³ and said that giving each

46. *Id.* at 15–16.

47. *Cf.* Cianci, *supra* note 2.

48. *See* Wyatt, *supra* note 4.

49. Levey, *supra* note 1, at 72.

50. This description was put forth by Paul Peterson, a representative of A Minor Consideration, a non-profit organization which protects child actors. *See* Levey, *supra* note 1, at 72.

51. *See* Wyatt, *supra* note 4.

52. *See* Levey, *supra* note 1, at 72; Cianci, *supra* note 2, at 386. *See also* Danielle M. Cantrell, Comment, *New Mexico as Hollywood's Backlot: An Examination of Film Financing, State Tax Incentives, and Constitutional Limitations*, 37 N.M. L. Rev. 533, 540-46 (2007) (explaining that it is likely that what led the producers to New Mexico was also its economic viability, because the state invests in the movie industry and tries to attract producers. The movie market accounts for approximately 6% of the state's economy).

53. *See* Summar, *New Law Protects Young Actors*, *supra* note 4; Tinnin Law Firm, *supra* note 9.

participant a sum of \$5,000 was a stipend and not a salary,⁵⁴ probably in order to avoid the definition of child labor and the obligation to provide the children with private tutors, for example. Nevertheless, it is possible that child labor was still involved because the children were engaged many more hours a day there than state law allows and under conditions prohibited by state law. The contract allowed the show's producers to call the children at any time, twenty-four hours a day, seven days a week. Under Israeli law, a labor relationship is established even if the parties agreed that it is not so; the test is a substantive one.⁵⁵ The network and parents must also answer the question of whether children should be taken out of school during the term so that they can participate in a reality program for money and fame.

The lawsuits submitted by the parents of children who were hurt by drinking bleach and sustaining burns did not deter CBS. The network tried to persuade advertisers to continue sponsoring the show, and they filmed and broadcast another season. The advertisers were faced with a dilemma: on one hand, ratings were skyrocketing, on the other hand, they had a problem supporting such a legally and socially problematic television program. In the meantime, some of the laws in New Mexico were changed,⁵⁶ perhaps as a reaction to the show. However, the question remains: is it right to make young children actually work for an adult's entertainment, especially in the middle of a school year and without sufficient adult supervision? In the case of this prototype, regulation is important. Unlike the engagement of children in the other prototypes or in commercials, this program was produced at an entirely closed site, with no communication with the outside world, including parents.

These three prototypes, with their advantages and disadvantages, help bring to light the problems typical of each category, and thus aid in defining a set of characteristics to describe child participation in reality programs and develop different methods of addressing the dilemmas inherent in such programs.

II. THE MAIN DILEMMAS

The literature has hardly dealt with the topic of children participating in reality programs. The existing literature deals mostly with the legal aspect of child labor. It seems that a comprehensive model for children

54. See Tinnin Law Firm, *supra* note 9.

55. See, e.g., National Labor Court 1403/01 Sarugey v. National Insurance Council 39(9) PDA 686 [2004] (Isr.).

56. See, e.g., N.M. Stat. Ann. §§ 50-6-1–50-6-19 (2007).

participating in reality programs has not yet been presented. It is possible to find some discussion of issues that relate to the topic, but there is a need for a balanced model that covers this area.

Note that the criticism is naturally aimed at broadcasting networks, especially franchisers and producers, but also at the channels and authorities. But one ought not to forget the parents, the legislature, and any of the other entities that play a role in the big ratings game of reality programs, voluntarily or not. While it is easy to see the half-empty glass, that the shows sacrifice the rights of children and families on the altar of ratings, the glass is also half-full given the advantages of some of the prototypes. It is important to strike an appropriate balance between the different rights of the children, the parents, and the broadcasters.

A. The possible damage to participants versus the benefits

The main question, which is strongly related to the issue of consent and other issues discussed here, concerns the different aspects of the damage caused to children participating in reality programs, both in the long term and the short term.⁵⁷

Even if one believes that child participation in programs that expose family life—also known as “docu-reality”—is sometimes inevitable because of the importance of the family values involved, at times such programs contain traumatic moments. Below are a few examples. In *Balloon Boy*, a six-year-old boy was forced by his parents to lie about disappearing in a hot air balloon while safely hiding inside his house, in order to reach peak television viewing ratings, earn money and fame, and increase the chances of the family getting its own reality program. The child later vomited during a live broadcast of the *Today Show*, when the ruse was revealed,⁵⁸ and yelled at his father during the *Larry King Live* program, saying “you guys said that we did this for the show.”⁵⁹ Besides the temporary damage of embarrassment and humiliation, this boy will always be the “balloon boy,” who threw up on a live broadcast.⁶⁰ Moreover, the lesson learned by the family’s children, that you need to

57. See Jonathan Cohen & Gabriel Weimann, *Who’s Afraid of Reality Shows? Exploring the Effects of Perceived Influence of Reality Shows and the Concern Over Their Social Effects on Willingness to Censor*, 35 COMM. RES. 382 (2008); Beth Montemurro, *Toward a Sociology of Reality Television*, 2 SOC. COMPASS 84 (2008).

58. See Ramon Ramirez, *What Will It Take?: In the Wake of the Outrageous Balloon Boy Hoax, a Call to Regulate the Long-Ignored Issue of Parental Exploitation of Children*, 20 S. CAL. INTERDISC. L.J. 617, 626 (2011); Neifeld, *supra* note 11, at 457–58; Glickman, *supra* note 2, at 147.

59. James Poniewozik, *Dead Tree Alert: What’s Right With Reality TV*, TIME (Feb. 12, 2010), <http://entertainment.time.com/2010/02/12/dead-tree-alert-whats-right-with-reality-tv/>.

60. See Levey, *supra* note 1, at 74.

cheat to help the family business, is problematic.⁶¹

In the series *Jon & Kate Plus Eight*, parents cynically exploit their eight children in order to improve their quality of life and make a great deal of money, both from the broadcast and from book sales. The parents seem to give no consideration for their children, who were raised against the background of their parents' divorce, heated arguments, affairs on the side, and other similar events with disastrous effects on the children.⁶²

Similarly, nearly pornographic scenes were displayed on the Internet site of the children's reality program *NYC Prep*.⁶³ Finally, in the program *Dance Moms: Miami*, girls training to dance in order to make money are also required to look pretty and attractive.⁶⁴ There are other cases in which child reality programs or programs with child participants sink to low levels.⁶⁵ Other countries also broadcast troublesome reality shows, such as the British *Baby Borrowers*, a program in which parents lend their babies to teenagers so that they can experience parenthood.⁶⁶ There are also family swapping shows, such as the Fox Network's *Trading Spouses* and *Wife Swap*, and a program on ABC in which children are exposed to experiments in which their mothers are taken away for a few weeks to live with other families, and they must adjust to new temporary mothers.⁶⁷ According to some scholars, the quantity of the scandals and extreme situations in reality programs indicates a constant race to the bottom.⁶⁸ Given the re-runs and widespread availability of these broadcasts online⁶⁹ and on mobile phones, and the frequency and speed by which video clips can be spread through social media sites like YouTube, the problems are likely to worsen and cause a situation in which the damage from the broadcast does not pass quickly or fade from memory. It will not be easy for children on these programs to recover from the damage.

Despite all of the above, it is easy to focus on the damages and claim that they always surpass any possible benefit. But, as will be discussed later

61. See Poniewozik, *supra* note 59.

62. See Royal, *supra* note 11, at 436, 487–88; Levey, *supra* note 1, at 72; Glickman, *supra* note 2, at 156–57.

63. Neifeld, *supra* note 11, at 454.

64. *Dance Moms: Miami Season 1 Promo's 2012 HD!*, YOUTUBE (Mar. 31, 2012), <http://www.youtube.com/watch?v=fqPQ2FYrl6l>.

65. Ramirez, *supra* note 58.

66. Royal, *supra* note 11, at 447.

67. Levey, *supra* note 1, at 73.

68. Ugolini, *supra* note 12, at 69.

69. Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 344 (2009).

in this Article, reality shows have some redeeming qualities. As such, a balance must be maintained, and efforts must be made to effectively prevent such damages before the broadcast.

Note that if actual damage typical of such exposure is proven, the participants of the program must show a causal link between the tortious conduct and the damages in order to prevail in a civil action. This is not always an easy task, especially given the fact that there are many factors that affect participant children as well as adults. Also, claimants will have to worry about statutes of limitations because damages sometimes materialize only after several years have passed.

1. Humiliation, emotional damage, and trouble dealing with “fast stardom” and rejection

Humiliation is common on reality programs because of the producers’ hidden assumption that humiliation rivets viewers and promotes enjoyment, suspense, and excitement,⁷⁰ as participants expose their emotions.⁷¹ Some argue that it is human nature to enjoy watching others fail, and unsuccessful contestants who humiliate themselves on reality shows provide this type of pleasure.⁷² Research has recognized the damage caused by embarrassing children in public and hurting their pride,⁷³ presenting them in their moments of weakness, crying, longing, or dealing badly with failure. Research also shows the long-term problems of fame and the children’s inability to deal with fame. All these can cause damages such as anxiety, depression, eating disorders, and even suicidal tendencies as a result of feelings of failure and of not having worked hard enough; such feelings are common among participants who did not move on to the next level of the competition or win.⁷⁴ Children can often harm themselves by their actions more than adults do because they are not aware of the consequences of their actions and words. This tendency varies with age, as discussed below.

Reality programs may have various negative emotional effects,

70. Alessandra Stanley, *TV Memo; Forget the Sex and Violence; Shame is the Ratings Leader*, N.Y. TIMES (Nov. 20, 2002), <http://www.nytimes.com/2002/11/20/business/tv-memo-forget-the-sex-and-violence-shame-is-the-ratings-leader.html>.

71. See Minna Aslama & Mervi Pantti, *Talking Alone: Reality TV, Emotions and Authenticity*, 9 EUR. J. OF CULTURAL STUD. 167 (2006).

72. According to psychotherapist Gladeana McMahon, who took part in writing Britain’s ethics code for reality programs. See Elizabeth Day, *Why Reality TV Works*, THE GUARDIAN (Nov. 21, 2010), <http://www.guardian.co.uk/tv-and-radio/2010/nov/21/why-reality-tv-works>.

73. See, e.g., Cianci, *supra* note 2.

74. Royal, *supra* note 11, at 449, 498–99.

especially in the long term,⁷⁵ and particularly during the period when the child's personality is developing and being formed.⁷⁶ It appears that eliminations on talent and survivor programs can be especially hard on children. At the same time, eliminations appear to "film well," with the camera following those who failed for a final shot as they are broken and crying. Indeed, there are recorded occurrences of children, as well as adults, breaking down emotionally after being eliminated or during stressful tasks,⁷⁷ perhaps because of the fear that they would not become famous. As one contestant on a reality program put it: "nowadays, being anonymous is worse than being poor."⁷⁸

The parents themselves often ruin a child's independence because they do not allow them to develop and decide for themselves how they appear before others.⁷⁹ Some children end up using drugs.⁸⁰ Others have difficulty dealing with success and being in the limelight. Quick stardom can have a bad effect on the stars themselves, as well as on the public who is blinded by that fast process, and ultimately envies the stars and strives to be like them. In reality, many stars disappear after a short time, which can be painful for them after they have become used to the limelight. There are many famous cases of successful child actors who did not remain stars in adulthood. Kristin Cavallari, an alumnus of the MTV reality show, *Laguna Beach*, in which she appeared at the age of seventeen, said: "I almost felt like it was unfair for [MTV] to come into our lives at such a young age and sort of mess with things. I don't regret it, but I was seventeen—of course I wanted to be on TV. I felt like they should have been a little bit more careful with us."⁸¹

Other contestants' reactions have been even less positive. People eliminated from reality programs have stated that they felt controlled.⁸² They claim that ratings-hungry producers manipulated them by using

75. Ramirez, *supra* note 58, at 635–36, 630–32.

76. Royal, *supra* note 11, at 440–50; Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA's Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L. REV. 39, 45 (2010).

77. Thirteen-year-old Rachel Crow broke down on stage when she was eliminated from the American reality program *The X-Factor*, cried, and screamed "but you promised me mom, you promised me." She then turned to the audience and said "I love you, without you I'm nothing." On *MasterChef Junior* in Australia, a twelve-year-old boy broke down twice during a stressful task. For a review, see Blair, *supra* note 12, at 2; Tara Brenner, Note, *A "Quizzical" Look into the Need for Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873 (2005).

78. Poniewozik, *supra* note 59.

79. Levey, *supra* note 1, at 74.

80. Ramirez, *supra* note 58, at 636.

81. Neifeld, *supra* note 11, at 456.

82. Blair, *supra* note 12, at 6.

psychologists and other professionals, filming them for many days at a time, not feeding them enough, distributing alcohol, and creating an environment that was always tense.⁸³ All this was intentional rather than coincidental, similar to the tactics used to interrogate prisoners and suspects.⁸⁴ In scandals exposed about the *Big Brother* program in Israel, it was claimed that a psychiatrist working for the production team distributed psychiatric medicines to participants to get them to stay at the *Big Brother* home instead of quitting, and to cause them to behave in a manner that would increase ratings.⁸⁵ The question arises with regard to programs like *Kid Nation* whether television producers will find it expedient to medicate children or otherwise manipulate them to keep them on the show and increase ratings.

Some critics of reality programs believe that these programs reflect the evils of the modern world,⁸⁶ while others have even coined unflattering words to express the manipulation that occurs in reality programs, such as “advertainment”⁸⁷ or “humilitainment.”⁸⁸ When children are exposed to such manipulation, the situation is worse. Other participants, viewers, friends, and even strangers, may also expose participating children to physical or emotional damage, for example, through Facebook or humiliating Internet comments.

Children, of course, have been appearing in commercials, movies, and television series for dozens of years. But reality programming exposes a child’s entire life to the public eye, including failures and outbursts. It does not merely present the attractive parts of a child’s life that are scripted and shown in commercials or movies, where children recite a written text and have been selected for their beauty or talent.

2. Abuse, neglect, and danger to life and health

Placing children in humiliating situations with the potential for emotional damage, as described above, and exposing them to danger, neglect, and exploitation has been argued to constitute emotional abuse of

83. *Id.* at 6–8.

84. *Id.* at 6.

85. Nati Tucker, *Sheinfine: “Big Brother distributed psychiatric pills”*; Keshet: “Demanded 2.5 million shekels,” HAARETZ—THE MARKER (June 3, 2012), <http://www.themarket.com/advertising/1.1657431>.

86. S. Rome, *Reality Television Needs to Get Real*, BOSTON HERALD (Feb. 15, 2002).

87. June Deery, *Reality TV as Advertainment*, 2 POPULAR COMMUNIC. 1 (2004).

88. Sara Booker & Bradley M. Waite, *Humilitainment? Lessons from The Apprentice: A Reality Television Content Analysis*, Presentation Before the Association for Psychological Science Seventeenth Annual Convention (May 26–29, 2005).

the child.⁸⁹ Abuse carries criminal charges⁹⁰ and opens the possibility of filing a tort claim against the parents⁹¹ and other entities. For example, if children do not want to be filmed, or are not aware of what they are getting into, this could be considered abuse. In cases of “docu-reality” or programs such as *Nanny 911*, the children do not ask to be filmed, and neither their parents nor the producers necessarily seek their consent. Exploitation by the networks may reach abuse, especially in cases of intentional manipulation by the producers for the purpose of increasing ratings.

Artists’ managers can also exploit children. In most cases the solution for such exploitation lies in contract law and claims of undue influence. In some states it is illegal to sign a contract directly with a minor.⁹² In other states, such as California, contracts may be signed directly with minors subject to certain qualifications, such as allowing the minor to cancel the contract.⁹³

The crime of neglect may also be relevant to programs such as *Kid Nation*, where children are left alone or almost alone, disconnected from their families during the school year for a period of six weeks, and are required, at a young age, to cook and clean for themselves, with all the dangers that these activities entail. In the case of *Kid Nation*, the Santa Fe sheriff investigated claims made by the mother of a girl who was injured while cooking during the filming.⁹⁴ The sheriff determined that there was no cause to press charges,⁹⁵ but the matter remains unresolved. A child’s increased possibility of spilling grease or being involved in other accidents greatly increases the duty owed to children. This means that children’s reality programming needs to be treated far differently from adult programming.

3. Damage to children at school

Additional damages may be caused to children in the educational

89. Royal, *supra* note 11, at 488.

90. For the relevance of criminal law with respect to reality programs in general, *see, e.g.*, James M. Keneally, *The Media and Criminal Law: Fact, Fiction, and Reality TV Symposium: Jury Nullification, Race, and The Wire*, 55 N.Y.L. SCH. L. REV. 941 (2010–11).

91. For children’s lawsuits claiming emotional or physical neglect and physical and sexual attacks, *see generally* Benjamin Shmueli, *Love and the Law: Or, What’s Love Got to Do With It?*, 17 DUKE J. GENDER L. & POL’Y 131 (2010).

92. *See* Thom Hardin, *The Regulation of Minors’ Entertainment Contracts: Effective California Law or Hollywood Grandeur?* 19 J. JUV. L. 376, 382–86 (1998) (elaborating on the contractual arrangements between children with managers under U.S. law.).

93. *Id.*

94. Wyatt, *supra* note 4.

95. *Id.*

system following their participation in reality programs, especially in programs such as *Nanny 911* where their weaknesses and problems are broadcast. Studies have shown that educators are more prone to form general prejudices about children, not believe in them, and not develop expectations of them, which may affect the children directly and convey a message that they cannot succeed.⁹⁶ It is possible that the parents of children who are friends of those who appeared on *Nanny 911* will not want their children to continue their friendship with a child who appears problematic or wild and who curses his parents. Other children may also tease them at school.⁹⁷ One can assume that some of the harassment may be provoked by jealousy or by humiliation endured by the child on the show. The harassment may be anonymous in the form of online comments on social media, or it might be face-to-face. Is it possible to say that a child who cries in front of the camera and says that he misses his family and disabled brother, as in the trailer for *Kid Nation*, will not be embarrassed and harmed by it in the future?⁹⁸ In some cases, children may not be able to rid themselves of the stigmas attached to them as a result of the broadcasts, and will forever be remembered by their humiliating appearance.

4. Damage to the family and family tensions

The entire family may be harmed by a child's appearance on a reality program. For example, the siblings of the filmed child may also be teased. The broadcast may lead to tensions between various family members, between the children and their parents, or between the children and their siblings. On therapy programs, situations can arise in which the relationship between the parents and the children becomes even more strained after the program, contrary to the program's original intentions. One can imagine that some parents are extremely nervous about their children competing with others, which makes them push their children even more, and creates an atmosphere of stress and even hysteria behind the scenes and at home. Children may also be upset with their parents for signing them up for the program if, for example, they are teased by other children, which can happen even many years later after they grow up and understand that the experience was harmful to them.

96. See, e.g., ROBERT ROSENTHAL & LEONORE JACOBSON, *PYGMALION IN THE CLASSROOM* (1968); Elisha Y. Babad, Jacinto Inbar & Robert Rosenthal, *Pygmalion, Galatea, and the Golem: Investigations of Biased and Unbiased Teachers*, 74 J. EDUC. PSYCH. 459 (1982).

97. OFFICE OF COMM. (U.K.), *CHILDREN IN PROGRAMMES 11–12* (2007), <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/rpt.pdf> [hereinafter *CHILDREN IN PROGRAMMES*].

98. *Kid Nation Trailer*, *supra* note 4.

5. Possible damage to viewers and society at large

There is a fear that some viewers of programs such as *Nanny 911* will either misinterpret the lessons to be learned from the programs, or will apply the lessons of the program to their own families instead of seeking professional help. There is also a fear that children who watch these programs will be exposed to apologetic attitudes toward inappropriate behavior by their peers, or will try to imitate problematic behavior in their real lives.⁹⁹ They may also receive distorted ideas about reality, especially because such cases are generally edited or even completely fake, and the problems portrayed on television are unrealistically met with immediate solutions. Some harm may also be caused by improper learning, unsuccessful personal experiences without proper supervision following the broadcast, the hopelessness that comes from watching a solution while realizing that it is not applicable, and by the family's incorrect beliefs that they are doing well compared with the family being portrayed on the show.

A more poignant problem is the commercialization of children, which necessarily entails placing a price tag on them, and has the potential to erode commonly held moral values.¹⁰⁰ As of 2013, the program *Bet on Your Baby*, one of the most extreme examples of commercialization, is being broadcast on the ABC network. In this show, parents give their children different challenges: one parent explains the challenge and the other bets on the child's reaction and whether the child will succeed. The children, aged two to three and a half, are asked to perform different tasks, such as holding a ball without letting go, building a tower out of cookies, or running in a circle. While the child performs the task, the producers usually try and distract them with different temptations. At each level there is a prize of \$5,000, and in the last round the parents can win a prize of \$50,000. Lavishing fame and fortune on the parents who send their children to these programs sends a message to society that one path to success is selling your children's privacy.¹⁰¹ These messages reflect a diminished value of childhood, leading to dangerous results that accompany such a shift.¹⁰² All of these phenomena point to a process of regression and deterioration, even after many great strides forward in the area of children's rights in the last few decades.

Another problem is the encouragement of voyeurism. Probing into family life leads to moral and social deterioration by encouraging viewers

99. Ugolini, *supra* note 12, at 79.

100. Royal, *supra* note 11, at 450–53.

101. *Id.*

102. *Id.* (arguing that such a society, where there is no longer any value placed on childhood and emotions have importance, results in a culture that has no values, no shame, and no privacy).

to derive entertainment from watching the suffering of others on television and by passing quick judgment on parents and children, which appears to empower viewers as better people and parents.¹⁰³ At times, voyeurism is not an expression of lower instincts but of curiosity about the lives of others and interactions between people, especially when they are “real” people as opposed to actors.¹⁰⁴

Reality programs are widespread and fascinate the public. Therefore, they may have an exaggerated effect, perhaps drastically, on molding worldviews.¹⁰⁵ This is especially problematic in the case of edited programs, which very often broadcast garish scenes and do not accurately represent the lives of the filmed people, resulting in severe and tangible damage.

6. Possible benefits to participants, viewers, and society

Some argue that reality programs have social benefits because they follow in the footsteps of documentary movies, and they replace more traditional forms of providing information about values that are important to the public, even if they convey the message in a manner that is more entertaining than formal, and even if it is for profit.¹⁰⁶ One study showed that girls aged eleven to seventeen who watch these programs reported that the programs are a topic of discussion between them, their parents, and their friends, and that the programs broaden their horizons in new directions.¹⁰⁷ Moreover, reality shows can also inspire education for excellence, dealing with difficulties, taking responsibility, developing autonomy, working hard to develop talents, and more. This provides benefits to participants on a personal level,¹⁰⁸ and also to the viewers, although it is possible to argue about the method by which these benefits are achieved. Reality programs also send a message to viewers that all people deserve a chance, without regard to their starting points, and that they can start anew, reinvent themselves,¹⁰⁹ and even survive humiliation

103. Robin L. Nabi et al., *Reality-Based Television Programming and the Psychology of its Appeal*, 5 MEDIA PSYCH. 303, 317, 319 (2003).

104. *Id.* at 319, 324, 352 (arguing that some ignore the other reasons for watching, besides low-level voyeurism, and therefore also ignore the solutions to this issue).

105. Cohen & Weimann, *supra* note 57, at 385–86.

106. Lunt, *supra* note 15, at 128.

107. Meredith Melnick, *What Reality TV Teaches Teen Girls*, TIME (Oct. 18, 2011), <http://healthland.time.com/2011/10/18/what-reality-tv-teaches-teen-girls/>.

108. Lunt, *supra* note 15, at 131; Peter Lunt & Tania Lewis, *OPRAH.com: Lifestyle Expertise and the Politics of Recognition*, 18 WOMEN & PERFORMANCE: A JOURNAL OF FEMINIST THEORY 9, 14 (2008).

109. Poniewozik, *supra* note 59; Melnick, *supra* note 107.

and difficult times.¹¹⁰

Furthermore, despite the fierce debate on the subject of child labor in *Kid Nation*, it is difficult to ignore what some of the participating children said. Eleven-year-old Mike from Washington said: "It was hard work, but it was really good. It taught us all that life is not all play and no work."¹¹¹ Ten-year-old Taylor from Georgia said: "I learned that I have to work for what I want."¹¹² However, one may argue that these skills can also be learned on an overnight trip or in a summer camp.

Producers of reality programs who documented teenage pregnancies in shows such as *16 and Pregnant* and *Teen Mom* emphasize that the goal of the program is to show how difficult it is to be pregnant as a teenager, and how difficult relationships are with their families and boyfriends. The overall goal of these programs, according to the producers, is to deter and help mitigate teenage pregnancy.¹¹³ As proof, producers point to data showing that the program's message reaches its intended audience, and that after the broadcast girls understand the difficulties involved in young pregnancy.¹¹⁴ The producers also explain that they specifically choose middle-class girls so that the viewers would not think that the phenomenon is characteristic of women from lower socio-economic backgrounds.¹¹⁵ One of the participants said that she believed she has already changed the lives of other girls because after the broadcast she has been going to schools speaking about adoption, contraceptives, and abstinence during the teen years.¹¹⁶ But there have been concerns that such programs present a reality in which many teens have unprotected sexual relations, although this may not be true.¹¹⁷ It may be argued that the correct way to relay these messages would be through documentaries in which the real identity of the participants is concealed, even if these movies would receive less media attention and suffer from reduced investment and returns.

In some cases, reality programs continue to teach children and help develop their talents after the broadcasts, such as the Israeli *Master Class*, a

110. James Poniewozik, *Why Reality TV is Good for Us*, TIME (Feb. 12, 2003), <http://www.time.com/time/magazine/article/0,9171,421047,00.html>.

111. Wyatt, *supra* note 4.

112. *Id.*

113. Feifei Sun, *Teen Moms Are Taking over Reality TV. Is That a Good Thing?*, TIME (July 7, 2011), <http://www.time.com/time/magazine/article/0,9171,2081928,00.html>.

114. *Id.* (referring to a study conducted in October 2010 by The National Campaign to Prevent Teen and Unplanned Pregnancy).

115. *Id.*

116. *Id.*

117. *Id.*

format that was sold to several countries in Europe and the East.¹¹⁸ In these programs, classes and weekly seminars continue for many months after the broadcasts.¹¹⁹ Finally, despite a contestant's fame-hungry parents, there are occasionally benefits for the children themselves, such as the development of a successful career, a facility for making friends and integrating into society, and having fame help the children avoid crime, drugs, and alcohol.¹²⁰

Therapy programs can provide certain solutions and practical tools for those who would not consider undertaking therapy¹²¹ and to families that cannot afford professional help. In some cases this solution may be sufficient, and it is better than no solution at all. Certain programs can broaden the horizons of viewers. For example, in light of the success stories shown on a reality program, families that were once wary of family therapy may change their minds about its effectiveness. These programs must make it clear that there are no easy solutions and that not all problems are resolved so easily or so speedily.

Also, there have been situations in which children became heroes at school after participating in reality programs, even if their weaknesses were put on display. Children who were unpopular because they were overweight, poor, or unattractive, or because of their sexual orientation, disability, or shyness, have seen their self-confidence and social standing improved in a way that empowers an entire sector of the population.¹²² From a social and multicultural point of view, there is a large potential for real and unscripted recognition of various sectors of the population, some of which are isolated and fearful of one another, such as minority groups, impoverished groups, immigrants, homosexuals and lesbians, and children with mental and physical disabilities.¹²³ Reality programs can have a significant social and cultural effect by abolishing common stereotypes and making the voices of minority groups heard among the general population.

118. *Keshet International strikes new deals for musical talent show Master Class*, KESHET INTERNATIONAL (Oct. 25, 2012), <http://www.keshetinternational.com/#!/Keshet-International-strikes-new-deals-for-musical-talent-show-Master-Class/c1zf1/hnm017hd165> (last visited Sept. 27, 2014); *Chinese production buys 6 Keshet TV formats*, JERUSALEM POST (Apr. 11, 2013), <http://www.jpost.com/Arts-and-Culture/Entertainment/Chinese-production-buys-Keshets-Eretz-Nehederet-309531> (last visited Sept. 27, 2014).

119. Roy Barak, *Reality Bites*, GLOBES (Isr.), Apr. 16, 2012 (on file with author).

120. Ramirez, *supra* note 58, at 639–40.

121. CHILDREN IN PROGRAMMES, *supra* note 97, at 9–10. The teenagers believed that they could learn ideas about proper behavior, and the parents claimed that watching such programs has educational value. *Id.*

122. *Id.*

123. Poniewozik, *supra* note 59; Melnick, *supra* note 107.

Furthermore, competition programs—especially group competitions—often show solidarity, mutual support, and encouragement among the contestants, which can send a positive message that is difficult to convey in scripted programs. A child who cried in the trailer for *Kid Nation* because he missed his disabled brother may be teased in school, but in reality he was immediately surrounded by a supportive group of participating children.¹²⁴

Some argue that even if reality programs do not encapsulate reality and normal lives, they have a great advantage in that they reveal the true personalities of the participants, not sanitized or fake ones. These people argue that the viewers—the voters—are interested in supporting real people by voting for their “happy endings,” and punishing others for hypocrisy and pretense.¹²⁵

There is a real dilemma here, and it may be difficult to strike a balance. On the one hand, it is in the interest of the public and children in general to present the children’s world and hear their voices, thus promoting freedom of expression. On the other hand, the interests of specific children and their privacy may be harmed by the broadcast if they do not want the exposure, even though children are willing to expose themselves in other aspects of their lives, such as on social media.¹²⁶ In the case of social media, parents are usually not part of the decision, and children control their own exposure by deciding what to upload and what to omit, whom to approve and whom to reject. There are circumstances when children do not want to approve their parents as “friends,” and if their parents pry into their affairs, children regard it as a violation of their privacy.¹²⁷ A television broadcast to the entire nation may be perceived differently, and not as a violation of privacy, although the question of whether the child wanted the broadcast remains. Therefore the balance is not a simple one: should society be paternalistic and explain to parents and children that exposure of this type is not good for the child, even if we do not intervene in many other cases of child exposure, such as social media? Does it depend on the child’s age and ability to distinguish between

124. See *Kid Nation Trailer*, *supra* note 4.

125. Day, *supra* note 72.

126. Nicolle B. Ellison, Charles Steinfield & Cliff Lamp, *The Benefits of Facebook “Friends:” Social Capital and College Students’ Use of Online Social Network Sites*, 12 J. COMPUTER-MEDIATED COMM. 1143, 1161 (2007).

127. Mizuko Ito et al., *Living and Learning with New Media: Summary of Findings from the Digital Youth Project*, John D. & Catherine T. MacArthur Found. Reps. on Digital Media & Learning 6, 19 (2008), <http://files.eric.ed.gov/fulltext/ED536072.pdf>; see also Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759 (2011) (addressing the question of children’s privacy vis-à-vis their parents).

exposure that is healthy and serves social purposes, and exposure that only appears to be positive but in reality reveals the child under humiliating circumstances, without control over the content of the exposure, its extent, and its persistence in the future? Does it matter that children retain control over their own social media postings while reality television broadcasters sell distribution rights? This matter leads to the next dilemma regarding real consent of the children, and eventually to the question of privacy. These matters are in some way intertwined with each other.

B. Informed consent

Adults who participate in reality programs knowingly agree to do so, even if they are not always aware of the risks. But do children also agree to be exposed? Do they understand the consequences? Is it merely the desires of the child's parents, friends, and society that are forced upon the child? Do parents who push their children to be exposed understand the possible consequences? And, can society trust them and allow them to make the decision about their child participating in these programs? In a world where children expose their lives on social networks, can one make demands upon broadcasting networks, especially if the child and his family signed consent forms? And is there a difference in this matter between competition programs, "docu-reality" programs, and *Nanny 911*?

Informed consent is one of the main issues from a contractual point of view, as well as from a tort and parent-child perspective. There is extensive legal literature on the subject of informed consent. For example, consent is legally salient when an individual seeks or refuses medical treatment, when a minor is involved, and when examining the parent-child relationship specifically. But there is not much literature on the subject of consent regarding children of different ages who participate in reality programs.¹²⁸ It is not at all clear that children and their families are aware of the problematic consequences of publicity, or that their consent is full, real, and informed.

The literature addresses, for example, the question of the validity of standard, one-sided, draconian contracts that waive the right of the family and the child to privacy, and the possibility of a lawsuit given that, unlike professional actors, participants are usually not represented by lawyers and agents.¹²⁹ This is especially relevant when children are involved, posing a

128. See, e.g., Neifeld, *supra* note 11, at 459.

129. Blair, *supra* note 12, at 2, 18–20; see also Kelley L. Tiffany, *Reality Show Participants: Employees or Independent Contractors?*, 32 EMP. REL. L.J. 15, 16 (2006); SAM BRENTON & REUBEN COHEN, *SHOOTING PEOPLE: ADVENTURES IN REALITY TV* 138, 141 (2003).

real distributional problem. In practice, standard contracts are so long and detailed¹³⁰ that they result in less litigation.¹³¹ Occasionally, when litigation cannot be avoided, standard contracts make it difficult to win a lawsuit against a broadcasting network.¹³² One can assume that settlements are made without accepting any responsibility, which does not deter future violations, unlike a publicized judgment in a lawsuit that receives wide exposure. Moreover, most families do not have independent resources and are not unionized under an actors' guild to oppose the networks by deploying the means required for first-rate legal counsel and representation.

However, it is not sufficient to discuss standard contracts. It is not at all clear that a child can give prior or retroactive consent to being presented in a certain light on the program, and therefore the child's age and level of understanding must also be taken into account. One must examine whether the child can even sign such a contract, and what the repercussions of such a signature are vis-à-vis the broadcasting networks (as opposed to the parents signing on behalf of the child), and at times even the repercussions of a child's signature vis-à-vis the parents who occasionally tend to appropriate the earned money.

Of course, the idea of what children can consent to varies not only from state to state, but also according to state-sponsored social policy. A teenager in most states cannot receive an aspirin from a school nurse without parental approval, but the same child may receive an abortion in many states without parental consent. Obtaining an abortion is certainly a much larger and more permanent decision than obtaining an aspirin, so the degree of difficulty and the degree of consequences do not necessarily correlate with the need to obtain parental consent.

With regard to adults, there is a discussion concerning whether and when consent is legally sufficient, whether the choice to participate protects the show's producers against future lawsuits, and whether participants can even waive their rights. There is also a debate on what happens when the show's results do not match the participant's expectations, and it later becomes clear that the participants did not know what they would be facing.¹³³

130. See, e.g., BRENTON & COHEN, *supra* note 129, at 138; Wyatt, *supra* note 4 (stating that the contract between the producers of *Kid Nation* and the parents of the children participating contained twenty-two pages); Tinnin Law Firm, *supra* note 9.

131. Blair, *supra* note 12, at 2.

132. See, e.g., BRENTON & COHEN, *supra* note 129, at 139–40; Blair, *supra* note 12, at 20–23.

133. See, e.g., BRENTON & COHEN, *supra* note 129, at 139–40; Blair, *supra* note 12, at 20, 24 (calling on the courts to examine the circumstances in each case); Glickman, *supra* note 2, at 157 (the testimony of Jon and Kate Gosselin, from the program *Jon & Kate Plus Eight*, who had no inkling of

With regard to children, the problem is more complex. Even when parents or guardians approve a child's participation, it does not mean that they weighed all the considerations and repercussions, or even that they acted in good faith and in the best interests of the minor. Parents and children often believe that the program will bring them glory and fame. Unlike participation in commercials or movies, in unscripted reality anything can happen, something parents and children do not always take into account. At times parents have too much faith in their children and their abilities, and are not prepared for a painful crash. They often do not expect biased editing, re-runs, or easy access to these programs on the Internet and mobile phones. Parents eager to publicize their children may, on behalf of their children, waive basic rights such as the right to privacy,¹³⁴ to medical care, and to quit filming. One can assume that a parent or guardian's signature authorizing the child's participation in the program according to the terms and conditions provided by the broadcasting networks can also be detrimental to the child, even if there is some benefit in it. It is also relevant that one cannot sign a contract to the detriment of a third party, but only to its benefit.

If media organizations inform children and their families of the reasonable dangers and potential consequences of participating before receiving the consent, and describe these dangers in sufficient detail, the parent's consent should be binding in principle. But even in this situation, the question remains whether parents can consent for their child. Given the potential harm, such consent is not unquestionably in good faith and in the minor's best interests.

Tort law is also relevant to consent regarding medical issues, especially when it comes to waiving rights to sue for insufficient medical care, as with *Kid Nation*. Does parental consent absolve the network of all responsibility? Are parents even allowed to waive their children basic rights on their behalf? Or is the waiver lawful because they did not waive the right to medical care but only to the right to file suits pertaining to the medical care? This last option seems logical, although in some ways it can encourage medical care that is too basic and insufficient because the broadcasting network knows that it will not be sued. But waiver of the right to a tort lawsuit, even in cases of emotional damage or infection with AIDS, especially in countries that do not have public health care, seems problematic. Can a child be left without any medical care and without the

what they were signing, and were not assisted by a lawyer or a manager); Poniewozik, *supra* note 59 (describing testimony of a participant on *Joe Millionaire* who signed a confidentiality agreement a day before filming began and only later understood what he was facing).

134. Cohen & Weimann, *supra* note 57, at 385.

ability to sue? And may he sue his parents, who did not act in good faith and in his best interest, even if they wanted him to be famous, and therefore were negligent and violated their parental duties? Can an eight-year-old child waive, by himself or through his parents, such important rights? It seems doubtful. It is not clear whether an action that is seemingly in the child's interest—achieving fame—provides a sufficient counterweight to the severe damage the child may sustain owing to the exposure. It is possible that in a country in which medical care is provided by the state, and where the child receives it through the state insurance program, children have no grounds to sue their parents on this point.

One study shows that both parents and children believe that the consent of children and their parents is not enough to protect children.¹³⁵ But it may be argued that the question of consent is less problematic in reality programs than it is with scripted programs, because the camera does not lie, and the networks broadcast only what was captured in the camera lens. Yet broadcasts are never aired unedited, and the viewer sees only a small segment of the footage that was originally captured over many hours of filming. The contract usually allows the franchise owner sole consideration on how to edit content and what to broadcast.¹³⁶ Admittedly, claims of faking reality programming and inserting scenes that never happened are rare, although they do occur,¹³⁷ but there is still a great deal of room for deception by emphasizing certain scenes and cutting others out, switching the order of the scenes, taking scenes out of context and attaching them to the unrelated ones, and even by deciding what to film.¹³⁸ Claims have been made about presenting children as evil through selective editing and actual direction of dramatic scenes,¹³⁹ which were intended to raise the entertainment level and the ratings¹⁴⁰ based on the assumption that it is always more profitable to show “definite” characters, such as a spoiled and annoying children. Without problematic children who require therapy and interventions, or neglectful, yelling, and physically violent parents, a family therapy program may not be justified. In Britain, defamation lawsuits were filed for selective editing,¹⁴¹ although the broadcaster

135. CHILDREN IN PROGRAMMES, *supra* note 97, at 18–19.

136. Ugolini, *supra* note 12, at 75.

137. See, e.g., James Poniewozik, *How Reality TV Fakes it*, TIME (June 29, 2006), <http://www.time.com/time/magazine/article/0,9171,1154194,00.html>; Brenner, *supra* note 77; Wyatt, *supra* note 4.

138. See Poniewozik, *supra* note 137 (describing testimony by Omarosa Manigault-Stallworth, who participated in *The Apprentice*).

139. Royal, *supra* note 11, at 445.

140. Ugolini, *supra* note 12, at 75.

141. *Id.* at 73–76.

claimed that the parents and children consented to a clause in the contract, allowing the broadcaster to edit the program according to its sole discretion and without consulting those being filmed.¹⁴²

Uninformed consent may not be sufficient for the meeting of the minds required under contract law, and may even void the agreement because of a flaw in the formation of the contract. It may also be possible to claim that these contracts are void because they are illegal, which occurs if the contract contradicts mandatory labor laws or public policy, or if parents waive their children's substantive rights. But it is not clear that this is the case for American programs because parents who send their children to summer camps and even to private schools sign similar contracts, with few legal repercussions.¹⁴³

The apparent basis of agreement in the contract may falter if it becomes clear that there is no real agreement, for example, because there is no way to know what the children will experience, especially during the first season of a program. It is possible that a parent's signature may not hold up in court if the parents are not acting in the best interest of the children. If parental consent is obtained to the detriment of their children, one may wish to bring a suit against the parents (for example, through a third party notice) rather than against the broadcasters. One must assume that for both distributional and practical reasons, a lawsuit filed by a child against his parents will be less successful and usually less relevant than a lawsuit against a broadcaster. For both distribution and deterrence reasons, this Article proposes that in their capacity as risk managers, broadcasters, and perhaps even advertisers, should be regarded as the best decision-makers and cheapest cost-avoiders. Proper regulation can provide incentives to broadcasters to take better and more successful precautions, and as a result minimize the damage that parents may cause their children, by strictly managing the participation of children in these programs.

Even if there is complete, real, and informed consent, other legal rights may be violated if children are emotionally harmed by the broadcast. Here, one must examine whether such harm could be the basis of a lawsuit against a franchise owner and the producers, despite the consent clauses in the contract that may protect them. Alternatively these harms may be the basis of a suit against the child's parents for the damage caused by their consent or encouragement to the child to participate in the program, subject to the obstacles placed before such a lawsuit.

142. *Id.* at 75. It is maybe similar to a contract of adhesion in the employment sector.

143. There are dangers in those places as well, although maybe not at the same level; children are usually not subject to neglect in such places.

In conclusion, the lack of real and informed consent could topple the contractual basis between the broadcaster and the parents and thus serve as a basis for both contractual and tort lawsuits. It must be emphasized that the issue of consent is relevant to all three prototypes presented in Part I—and especially to the last prototype, survival shows—given the waiver of the right to sue for medical damages on behalf of the children. But the problem of consent to exposure and violations of privacy exists in the other prototypes, such as talent competitions, even if the children appear to agree wholeheartedly to participate, although in these prototypes it is less problematic. In the trailers of programs such as *Kid Nation* or *Nanny 911* children can be seen suffering or crying because of homesickness or fights. Does this reality cause emotional damage later in the children's lives, especially when it is documented? Are the children being teased in school by others who saw their weaknesses being exposed? Is it unreasonable on the part of the parents and the network to waive the children's right to privacy? Is it possible to prevent re-runs or the uploading of entire episodes to the program's website or to YouTube? These questions are disturbing. In many cases, even if the children consented, the consent is not in their interest and thus is not real and informed. Clearly, if it is not the children but their parents who consented, consent is problematic, both vis-à-vis the broadcasting networks and between the children and their parents. Therefore, it is necessary to address the issue of consent much more clearly, through conventions or legislation.

C. Fear of conflicts of interest between the child and his family due to the parents' desire for fame

Despite the basic assumption that parents are the best protectors of their children,¹⁴⁴ at times they do not fulfill their duties to their children.¹⁴⁵ Fame-hungry and controlling parents at times exploit their children¹⁴⁶ for glory or money,¹⁴⁷ and promote their child at any price.¹⁴⁸ This can result in a child being hurt not only by exposure, exploitation, and associated tension and negativity, but also by the fact that it is the parents who are

144. Glickman, *supra* note 2, at 165.

145. See, e.g., 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).

146. See, e.g., Ramirez, *supra* note 58, at 634; Levey, *supra* note 1, at 72.

147. See, e.g., Ramirez, *supra* note 58, at 625, 640; Neifeld, *supra* note 11, at 460–62.; Royal, *supra* note 11, at 440–42; Levey, *supra* note 1, at 73–74; Hardin, *supra* note 92, at 277, 385; Krieg, *supra* note 145, at 432; Erica Siegel, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 438–41 (2000).

148. See, e.g., Ramirez, *supra* note 58, at 625; Levey, *supra* note 1, at 72–73; Neifeld, *supra* note 11, at 457–58.

doing the exploiting.¹⁴⁹ Professionals believe that parents who consent to their children appearing in reality programs are betraying their duties, or at least creating a problem by choosing fifteen minutes of fame for their children.¹⁵⁰

But the motive is not only the parent's own hunger for fame. In the case of some reality programs, such as *Dr. Phil*, *Oprah*, and maybe even *Nanny 911*, it seems that some parents believe the programs do help, that they offer a dispute resolution and purification process despite the fact that the setting is staged and does not reflect reality. The desire to purify and heal in a setting that is not real and that seemingly protects the participants sometimes leads parents to consent to the exposure, even if they are not primarily motivated by fame. Some parents may believe that the healing portrayed in the program will transform their lives. Others may be tempted into letting their children participate because of distress, confusion, need, or terrible helplessness, despite the fact that there are better ways to fix their problems that do not take place in front of cameras.

Even parents with fundamentally good intentions may be struck by "intensive parenting," as part of the "helicopter" or "alpha parenting" phenomenon. These parents place a great deal of pressure on their children to participate in a reality program, even if it later causes psychological harm. This may be the case if, for example, the children are not sufficiently talented to participate in a competition but the parents are undeterred. This is often referred to as "over-parenting."¹⁵¹

Parents may also mistakenly infringe on their child's rights because they are blinded by potential exposure. Often they are aware only of the glamour, and know little about the production processes involved and their potential problematic consequences for the participating children.¹⁵² In some cases parents see themselves, not their children, as the focus of the program, as may be the case when documenting the lives of celebrities who are used to being in the public eye and are less aware of the damages that their children may incur.

In any case, parents contribute to the violation of their children's

149. See Ramirez, *supra* note 58, at 626–27.

150. See Levey, *supra* note 1, at 72, 74. Of course it should be differentiated from other public events. One could make a similar exploitation argument about a parent putting his child on stage in the school play. Obviously, there's a difference in degree and exposure.

151. See generally Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221 (2011).

152. Cf. OFFICE OF COMM. (U.K.), GUIDANCE NOTES, SECTION ONE: PROTECTING THE UNDER 18S 13 (Dec. 16, 2009), <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/812612/section1.pdf> [hereinafter GUIDANCE NOTES].

privacy. This topic has not been developed enough to date, but there is a nascent discussion about the children's right to privacy not only from external parties such as broadcasting networks, but also from their parents.¹⁵³ Currently, children of all ages, even more so than adults, renounce their privacy easily and expose their lives, personal details, and actual secrets on Facebook and other social media.¹⁵⁴ The television medium is not exceptional in this matter, and any artificial attempt to limit exposure and stand up for the right of children not to be exposed or to protect their privacy is perceived as a paternalistic, outdated attempt that is not in step with modern life. There is a true dilemma here. A discussion of this multi-faceted and complex issue follows below as a part of the discussion on the right to privacy.

Unlike other cases of parental behavior that do not serve the interests of their children, the dilemma is greater in the case of reality programs. Common claims of parental behavior against the interests of the child refer to cases of abuse or neglect, or where the parents use the child against the other partner in a divorce proceeding. In these cases the parent is the main culprit. In our case, responsibility can be assigned to the broadcasting networks much more naturally from both a deterrent and a distributional perspective. Although one cannot completely rule out tort lawsuits by children against their parents, such lawsuits are still a relatively rare occurrence.¹⁵⁵

Even in extreme cases such as abuse and forced hospitalization, tort lawsuits between children and parents have been subject to complete immunity under American law; in some states this immunity still exists, albeit in restricted ways.¹⁵⁶ Such a lawsuit is usually not practical if the child lives with his parents.¹⁵⁷ Moreover, to file such a lawsuit, one must prove damages from continued and severe exposure, or the intention and desire of the parents to lay their hands on the child's money. Lawsuits against parents based on violation of privacy have still not been accepted,

153. Shmueli & Blecher-Prigat, *supra* note 127.

154. Kaveri Subrahmanyam & Patricia Greenfield, *Online Communication and Adolescent Relationships*, FUTUREOFCHILDREN.ORG (2008), <http://files.eric.ed.gov/fulltext/EJ795861.pdf>; Alice E. Marwick & Danah Boyd, *The Drama! Teen Conflict, Gossip, and Bullying in Networked Publics*, Presentation at A Decade in Internet Time: Symposium on the Dynamics of the Internet and Society (Sep. 12, 2011), <http://ssrn.com/abstract=1926349>.

155. See, e.g., Shmueli, *Love and the Law*, *supra* note 91.

156. See, e.g., Steven G. Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689 (2000); Sandra L. Haley, Comment, *The Parental Tort Immunity Doctrine: Is It A Defensible Defense?*, 30 U. RICH. L. REV. 575 (1996); Shmueli, *Love and the Law*, *supra* note 91.

157. Shmueli, *Love and the Law*, *supra* note 91, at 134, 141.

and it is not clear that lawsuits based on reality programs will be the first ones to be accepted, because even if children have a right to privacy vis-à-vis their parents, it is not clear that this right creates a tort cause of action.¹⁵⁸ But one should emphasize that society's obligation extends beyond simply protecting parents from children tempted by fame and fortune; society should also help parents overcome some of those biases in the first place by creating a regulatory regime that induces networks and parents to be more careful. This is necessary because, unlike broadcasters, parents are not always aware of the consequences and implications of sending their children to reality shows.

Additionally, there is a more suitable entity with deeper pockets from the deterrence and distributional perspective: the broadcaster. Indeed, the disparity in power between the broadcaster and the children is so large—especially if the parents, willingly or not, serve as the broadcaster's sales agents—that it is justifiable from the deterrence and distribution point of view to impose liability on the broadcasters. Admittedly, the broadcaster did not force the parents to sign the agreements. But it is possible to incentivize broadcasters, which are powerful, financial, risk-managing entities, to take greater safety precautions. For example, broadcasters can draft clearer agreements and take steps to ensure the physical and emotional well-being of the children. These entities, especially the producers, have information that makes them, under the circumstances, the best decision-makers, although they are not the only risk-avoiders, given that parents could also refuse to allow their children to participate in a program.¹⁵⁹

A fame-hungry parent is not, under the circumstances, the best decision-maker regarding damages: despite all the proven harms that children have sustained in these programs, there remains a sufficient number of parents who are willing to sign contracts with producers and give up their children's rights without examining the possible dangers and preventative measures.¹⁶⁰ Proper regulation could turn the broadcasting network into a considerate entity that could help parents prevent harm to their children,¹⁶¹ by having parents sign qualified and limited contracts that

158. Shmueli & Blecher-Prigat, *supra* note 127.

159. In any case, after signing the children up for the program, the control is out of the hands of the parents, who cannot easily go back on their agreements or control the editing of the broadcast. Therefore, after registration, the broadcasting networks are even more clearly the best decision makers. For the test of "the best decision-maker" and for the differences between it and "the cheapest cost avoider" as tests for strict tort liability, see Guido Calabresi & Jon T. Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

160. Levey, *supra* note 1, at 74.

161. In practice, according to the theories of Calabresi & Hirschoff, *supra* note 159, liability will

would benefit their children. Unlike most parents, broadcasters are calculating entities; we expect them to manage their risks and calculate the necessary precautions according to the probability of damage. Therefore, they can be optimally deterred by imposing liability on them.¹⁶²

One must further examine whether advertisers are also liable, assuming that they are aware of the content of the programs, because in practice they are the ones who are funding violations of the child's rights. Advertisers may also be considered the best decision-makers on whom civil liability should be imposed because the broadcast is largely dependent on their funding. Broadcasters care a great deal about keeping advertisers happy; if they lose advertising dollars over controversial programming, they would be very likely to remove the program.

The main burden of preventing harm to children that ought to be reflected in any new regulations should be laid on broadcasters. This can be accomplished by soft regulation, through agreements and bylaws, or through legislation. Clear and strong regulation or legislation that restricts broadcasters will also help restrain parents' hunger for fame when signing on behalf of their children.

D. Clash between the privacy of children, UNCRC'S evolving capacities principle, and the freedom of commercial expression and speech

It seems that the main dilemma in the matter of children participating in reality programs is the clash between two weighty interests: children's rights and privacy on one hand, and commercial freedoms of expression and speech on the other. We begin with children's rights,¹⁶³ including children's dignity and the protection of their interests, which are all internationally recognized rights under the United Nations Convention on the Rights of the Child (UNCRC).¹⁶⁴

Among the rights that could be harmed are the child's autonomy¹⁶⁵ and mental health.¹⁶⁶ There is also breach of privacy,¹⁶⁷ an important and

be imposed on the best decision-maker when it is the one that can best motivate and even "bribe" the cheapest cost avoider to prevent damage. This construction seems highly appropriate to our matter.

162. If not strict liability, then fault-based liability, in cases of deviation from reasonableness, for example, using the Hand Formula as a general test for negligence. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 29–34 (1972); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85–88, 96–107 (1987).

163. See, e.g., Ramirez, *supra* note 58, at 641–49.

164. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter UNCRC].

165. Ramirez, *supra* note 58, at 626, 640.

166. See, e.g., Cianci, *supra* note 2.

167. Privacy is not regulated in the Constitution, its amendments, or in the Bill of Rights, but it is

internationally recognized value for children,¹⁶⁸ because they experience public emotional turmoil and cannot choose their audience and what to expose.¹⁶⁹ Intense and extensive exposure such as re-runs often results in hurt feelings and damage to the child's personality.¹⁷⁰ Parents and broadcasters have a duty to protect children's privacy.¹⁷¹ Matters of the individual's right to privacy, such as the prohibition against exposing a medical or emotional condition, or any other information about the individual's private life, must not be debatable. As discussed below, there is disagreement over other forms of violations of privacy.

Paragraph 5 of the UNCRC describes the principle of evolving capacities.¹⁷² According to this principle, children have certain inherent rights from the moment they are born, such as the right to food or security.¹⁷³ But other rights—autonomous rights—are granted to them gradually, according to their age and abilities, both physical and emotional.¹⁷⁴ This is so they will be protected as they age, rather than “be abandoned to their rights.”¹⁷⁵ Thus, for example, children are protected from being exposed to matters that are not suitable for their age that may cause them harm, supposedly in the name of fulfilling their rights.¹⁷⁶ The evolving capacities principle is also applicable when defining age groups for consent and participation in reality television.

At times, children can care less about their privacy than adults.¹⁷⁷ Modern day children are active on the Internet and frequently expose

well enshrined in case law. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). But the limits and scope of the right are not clear and definitive. *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1088 (2002). For a brief review of existing approaches, *see* Shmueli & Blecher-Prigat, *supra* note 127, at 764–68.

168. UNCRC, *supra* note 164, § 16.

169. Royal, *supra* note 11, at 449–50, 443–44.

170. Blackman, *supra* note 69, at 314–27, 380–81.

171. Shmueli & Blecher-Prigat, *supra* note 127.

172. UNCRC, *supra* note 164, § 5; *see also* GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD* 3 (2005), <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>.

173. UNCRC, *supra* note 164, § 5; LANSDOWN, *supra* note 172.

174. UNCRC, *supra* note 164, § 5; LANSDOWN, *supra* note 172.

175. UNCRC, *supra* note 164, § 5; LANSDOWN, *supra* note 172.

176. *Id.*; Zheng Yan, *Age Differences in Children's Understanding of the Complexity of the Internet*, 26 J. APPLIED DEVELOPMENTAL PSYCH. 385 (2005).

177. Lilian Edwards & Ian Brown, *Data Control and Social Networking: Irreconcilable Ideas?, in* HARBORING DATA: INFORMATION SECURITY, LAW AND THE CORPORATION 202, 204 (Andrea A. Matwyshyn ed., 2009); JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 71 (2008); DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 82 (2008); Deborah M. Moscardelli & Catherine Liston-Heyes, *Teens Surfing The Net: How Do They Learn To Protect Their Privacy?*, 2 J. BUS. & ECON. RES. 43, 43 (2004).

details about themselves on social networks. Therefore, at least at certain ages, it can be assumed that they give genuine consent to such exposure, inasmuch as they control it.¹⁷⁸ Children do not give genuine consent when it comes to reality programs because broadcasters sometimes take advantage of their desire to become famous and thus their consent is not real. One must remember that children are not unionized nor are they considered employees, and in most countries there is no specific legislation that protects them.¹⁷⁹ When children expose their lives on a reality program, one must take a more paternalistic approach than one does with adults, and not “leave them to their rights.”¹⁸⁰ In contrast to social networks, children cannot respond to a broadcast that portrays them in a certain way. This is even more important if the child did not agree to be exposed on the program, and it was their parents’ wish that they be filmed, as in “docu-reality” cases or on *Nanny 911*.

The first natural and obvious protection against breaches of privacy is the parents’ and children’s consent, which serves also as contractual consent. It is possible to compare this situation to that of public figures, who are exposed by virtue of the positions they chose.¹⁸¹ In this comparison, participants in reality programs who chose to be exposed should also not have the right to privacy, or they should have only a weaker version of that right because they made their choice and they want to become famous.¹⁸² But the situation is more complex, especially if a child’s consent is uninformed.

We must also ask whether the children want to become famous at any cost. People do not entirely give up their right to privacy when they leave their home, because there is a certain level of privacy even in the public sphere.¹⁸³ Owing in part to celebrity gossip and reality programs, society

178. See, e.g., Yan, *supra* note 176 (presenting two different approaches to children’s privacy and the Internet, according to their ages and their injuries. Among the concepts of the rights to privacy is also the right to privacy as control or autonomy, and it seems that for many children this is dependent on their age and the time); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7, 171 (1967); LAURENCE LESSIG, *CODE VERSION 2.0* 228–30 (2006) (expanding on the subject of privacy as control or autonomy).

179. See, e.g., Glickman, *supra* note 2, at 149; Cianci, *supra* note 2, at 364.

180. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 *CARDOZO L. REV.* 1747, 1842 (1993); see also Shmueli & Blecher-Prigat, *supra* note 127, at 769–70 (expanding on the need for a special perception of children’s rights).

181. Blackman, *supra* note 69, at 318 (referencing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 215–17 (1890)).

182. *Carlisle v. Fawcett Publ’ns, Inc.*, 20 *Cal. Rptr.* 405, 414 (Cal. Ct. App. 1962); Blackman, *supra* note 69, at 38.

183. Blackman, *supra* note 69, at 356.

has become more tolerant of breaches of privacy,¹⁸⁴ and society has become accustomed to such breaches¹⁸⁵ as people have become “part of the show.”¹⁸⁶ At the same time, although privacy is important for a child’s development,¹⁸⁷ one cannot ignore the change in our perception of privacy in a world in which most experiences are shared on social media, where children do not see anything wrong with posting their thoughts and actions on social networks, and where, in many cases, the parents do not intervene. It may be problematic to claim breaches of privacy when a child and his family consent to the exposure, assuming that their consent is genuine and informed.

An approach that sees children not only as adults in the making (“becoming”), but that also sees children as existing in a state (“being”), has merit. This approach allows children, at all stages of their development, to be recognized as human beings with their own unique, individual voices that deserve to be heard in their own right and that deserve to be understood.¹⁸⁸ Using this social approach, it may be difficult to raise a claim of breach of privacy because of the paternalistic nature of such a claim. If we recognize the individuality and autonomy of children despite their young age, their consent may be valid even if adults see it as an invasion of privacy because reality programs, much like the use of social media, reflect a reality in which people manage their lives while fully exposed.¹⁸⁹ Participation in reality shows may be an embodiment of children’s freedom of expression. Nevertheless, as noted above, children do not always know what to expect in reality programs, and they have no control over them, in contrast to their exposure on social media sites. One must assume that this matter will be tested subjectively and not objectively, based on what individual children, according to their age, and their parents understood when they signed the agreement and what was explained to them at that time.

There are other important rights to consider, however. One of these is the freedom of commercial expression, speech, and broadcast, which was

184. *Id.* at 363–64.

185. *Id.*; Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 737 (1999).

186. Day, *supra* note 72.

187. Christine A. Readdick, *Solitary Pursuits: Supporting Children’s Privacy Needs*, 49 YOUNG CHILDREN 60 (1993); Karyn D. McKinney, *Space, Body, and Mind: Parental Perceptions of Children’s Privacy Needs*, 19 J. FAM. ISSUES 75 (1998).

188. Dafna Lemish, *Introduction: Children, Adolescents and Media: Creating a Shared Scholarly Arena*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK ON CHILDREN, ADOLESCENTS AND MEDIA 1, 6–8 (Dafna Lemish ed., forthcoming); MAYA GÖTZ ET AL., *MEDIA AND THE MAKE-BELIEVE WORLDS OF CHILDREN: WHEN HARRY POTTER MEETS POKÉMON IN DISNEYLAND* (2005).

189. Poniewozik, *supra* note 59.

recognized as an important right even at the international level.¹⁹⁰ This right includes the freedom of broadcasters and advertisers, as free and independent members of the media, and the freedom of the children, their parents, and even viewers. Freedom of expression, which includes the commercial freedom of expression of channels and producers, is highly relevant in light of the First Amendment to the United States Constitution, and given its great social importance, it is very difficult to limit.¹⁹¹

The American Federal Communications Commission (FCC) is an independent agency established by law to oversee interstate and foreign communications.¹⁹² Its responsibility is to grant, change, or cancel broadcasting licenses, and in general it is expected to protect the public interest in the field of communication.¹⁹³ The FCC does not consider itself to be in charge of culture or viewer education. Instead, it focuses on efficient fund allocation, protecting consumers from harm, and making tools available that allow fair competition in the field of communications and as much free access as possible to means of communication and to communication infrastructure.¹⁹⁴ Over the years, various administrations have pressed for deregulation, and equated the public interest with constant competition in a free market.¹⁹⁵ The high point was the 1996 Telecommunications Act, which made network television licenses nearly immune from FCC regulatory intervention.¹⁹⁶ Despite the fact that the FCC has the power to revoke broadcasting licenses if it believes that this will

190. Commercial speech enjoys fewer protections than regular speech. See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983). But it enjoys a substantial degree of protection. See *Bigelow v. Virginia*, 421 U.S. 809 (1975); see also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Freedom of expression was regulated within the framework of section ten of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Freedom of expression provides the right to have an opinion and to receive and relay messages and ideas without intervention by public authorities, but also allows these rights to be limited. Cf. 2009 BROADCAST BULLETIN, *supra* note 19, at 5 (noting that despite Ofcom's goal of protecting children, they do not ignore the need to ensure freedom of expression according to the European Convention for the Protection of Human Rights). The European Convention also includes the right of the broadcaster to relay information and ideas, as well as the public's right to receive them. These rights should not be infringed unless the limitations are required by law, and a legitimate purpose is necessary to impose any limitations. The emphasis is placed on the way in which the content is relayed in the broadcast. See *id.* at 19.

191. Blackman, *supra* note 69, at 326–27, 373–74. For a discussion on the application of the First Amendment to children, see KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT (2003).

192. Brenner, *supra* note 77, at 877–79, 898.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

serve the public interest, it has typically avoided doing so for freedom of expression concerns, among other reasons.¹⁹⁷ But the FCC is of the opinion that it still wields a weapon that, despite all obstacles, can help supervise reality programs—an ordinance that can justify regulation in the case of illegality and cheating.¹⁹⁸ Moreover, it seems that the public is not aware of the FCC's habitual policy of non-intervention and therefore erroneously believes that reality programs are supervised.¹⁹⁹

Some believe that a federal law regulating or prohibiting child participation in reality programs would still be constitutional under the First Amendment because children can still express themselves in many other ways.²⁰⁰ They also explain this would be the regulation of a right rather than its cancellation or prevention.²⁰¹ At most, it would limit one form of expression and not limit the content of the right.²⁰² It seems clear that, because children cannot make proper choices given their lack of life experiences and immature judgment, a court could prevent them from expressing themselves in a harmful way; therefore, even a ban on participation would not contradict the First Amendment.²⁰³

Freedom of expression and freedom of speech are some of the principal values of society, and therefore it seems natural that commercial freedom of expression and speech would be protected and recognized. Nevertheless, commercial freedom of expression has not yet been expressly recognized as worthy of constitutional protection under the First Amendment. Commercial freedom of expression is actually a part of freedom of expression, but it can be limited for important public policy reasons.²⁰⁴ Because the societal interest in freedom of expression in the commercial field is less than the interest in other forms of expression, commercial freedom of expression can be limited even when the opposing interest is relatively weak and when a similar limitation cannot be justified for a noncommercial expression.

197. *Id.*

198. *Id.* I will not expand on this because problems in children's participation are addressed even without cheating in the program.

199. *Id.*

200. Royal, *supra* note 11, at 453–72, 482–99. Also, it seems that states and the federal government can subject broadcasters to generally applicable economic regulations without creating constitutional problems. *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983).

201. Royal, *supra* note 11.

202. *Id.*; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

203. Royal, *supra* note 11, at 497.

204. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

Another relevant form of freedom of expression is the cultural value of respecting the ability of people—including TV broadcasters—to express themselves. But it is clear that there should be major limits on how they can express themselves. Broadcasters should not be able to engage in methods of expression that have a potential for serious harm children, under the assumption that children’s rights should predominate.

The balance between commercial freedoms of expression and children’s privacy has not been examined with regard to our topic. But because reality television deals with children and parents who are susceptible to human error and temptations, it seems that the balance must be tilted against the freedom of expression of broadcasters and advertisers. This is especially important in light of the problems with consent discussed above.

E. Child labor

In the past, there have been two approaches to regulating child participation in the entertainment industry.²⁰⁵ One approach does not consider children as employees because young actors participate in television programs for educational purposes and pleasure.²⁰⁶ Another approach, based on the desire to enact child labor laws, views parents as taking advantage of their children and turning them into walking businesses so that the children can support their parents.²⁰⁷ The compromise between these two extreme approaches is to place limitations on work hours and to legislate certain norms regarding payments to children.²⁰⁸

There is a considerable amount of literature about child labor and signing contracts with children in the entertainment industry, some of which does not specifically discuss reality programs. Discussions center over whether Congress should create federal legislation or whether it should leave legislation, if any, to the states. The literature also discusses adapting such laws to the First Amendment.²⁰⁹ In most cases, children who participate in reality television are not considered employees or performers,²¹⁰ but rather have the indeterminate status of “participants.”²¹¹

205. Levey, *supra* note 1, at 73.

206. *Id.*

207. *Id.*

208. *Id.*

209. Glickman, *supra* note 2; Cianci, *supra* note 2; Adam P. Greenberg, *Reality’s Kids: Are Children who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act?*, 82 S. CAL. L. REV. 595; Hardin, *supra* note 92; Heather Hruby, *That’s Show Business, Kid: An Overview of Contract Law in the Entertainment Industry*, 27 J. JUV. L. 47 (2006).

210. Levey, *supra* note 1, at 73; Krieg, *supra* note 145, at 431.

As with adults who participate in programs such as *Survivor* and *The Amazing Race*, child participation is considered part of a game show and not one that creates a working relationship. The only exception is the *American Idol* singing competition, where a team of finalists, consisting of the last twelve contestants become members of the American Federation of Television and Radio Actors (AFTRA) and receive professional protection from the Federation.²¹²

Scholars are not satisfied with the existing relationship between the participants in reality programs and broadcasters; they are examining whether the relationship can be considered a working relationship at all, or whether it may be a different type of relationship, such as that of independent contractors.²¹³ At times, although the broadcaster-child relationship is not generally defined as such, it resembles a working relationship because the broadcaster effectively acts as an employer.²¹⁴ Moreover, if the employer controls the operation, which is primarily for his benefit, the relationship cannot be characterized as one with an independent contractor.²¹⁵ The producers usually have full control over the filming and the plot.²¹⁶ Even if, on occasion, the participants benefit from the program, it is clear that producers and franchisers benefit the most from high ratings and income, including substantial revenues from advertising and sponsorships.²¹⁷ If children are paid for their participation, it is more likely to be viewed as a working relationship.²¹⁸ But some believe that participants should not be considered volunteers even if they receive no payment, as long as they receive food and lodging from the producers.²¹⁹

Although the literature does not specifically deal with children, one can infer that participants in reality programs should be considered employees, even if it is clear that this designation alone would be insufficient.²²⁰ In addition to the problematic aspect of being a weak working class, child participants are not professional actors protected by professional organizations.²²¹ Therefore, the calls to recognize participants

211. Glickman, *supra* note 2, at 148–49.

212. Levey, *supra* note 1, at 73–74.

213. Glickman, *supra* note 2, at 159–69.

214. *Commonwealth v. McKaig*, 29 Pa. D. & C. 629, 631–34 (Pa. Phila. Ct. 1937).

215. Greenberg, *supra* note 209, at 608; Glickman, *supra* note 2, at 160.

216. Glickman, *supra* note 2, at 160–64.

217. Podlas, *supra* note 76, at 47–48; Glickman, *supra* note 2, at 164.

218. Glickman, *supra* note 2, at 160.

219. Blair, *supra* note 12, at 3–5.

220. Royal, *supra* note 11.

221. Greenberg, *supra* note 209, at 597 (explaining that in the U.S. reality program participants are not part of the Screen Actors Guild (SAG) or the American Federation of Television and Radio Artists

in reality programs as employees are understandable.²²² For children, this is even more important.

The European directive on protecting children in the workplace was approved by the European Union Council and is binding on members of the European Union.²²³ The directive does not specifically refer to children participating in reality programs, but it contains a few guiding principles regarding child participation in television programs in general. Among these are the importance of protecting the child's health and safety,²²⁴ a directive to member countries to prevent harm to the education of working children,²²⁵ determining periods of rest for working children,²²⁶ the employer's liability to the children working for them,²²⁷ and various provisions concerning child labor, according to an age division.²²⁸ The directive specifically approves child labor in the fields of culture and art,²²⁹ and instructs member states to develop methods to enforce these instructions, as well as sanctions in case they are violated.²³⁰ It also requires that the steps taken be effective and proportional.²³¹

It is very important to write legislation that will guarantee income for children because of the likelihood that their parents and managers will take advantage of the situation and retain their profits.²³² The Fair Labor Standards Act (FLSA), the main federal law protecting children from abusive labor practices, does not apply to the entertainment industry.²³³ This allows room for state legislation, but leaves the status of the participants unclear.²³⁴ Therefore, one can apparently sign a contract directly with a child in the entertainment industry, including in reality programs. The child does not benefit from the protections of federal law

(AFTRA), the two Hollywood unions that represent actors and performers, respectively); Glickman, *supra* note 2, at 164–165 (comparing the situation of child participants in reality programs to that of animals, and claiming that, thanks to the American Humane Association, animals are better protected than children).

222. See, e.g., Blair, *supra* note 12, at 3–5.

223. Council Directive 94/33/EC 1994 O.J. (L 216) (EC).

224. *Id.* § 5(2).

225. *Id.*

226. *Id.* § 5(1)

227. *Id.*

228. *Id.*

229. *Id.* § 5(1).

230. *Id.* §14.

231. *Id.*

232. Hardin, *supra* note 93, *passim*.

233. Fair Labor Standards Act, 29 U.S.C. § 213(C)(3) (2006).

234. Hruby, *supra* note 209, at 48; Greenberg, *supra* note 209, at 598, 622–23; Glickman, *supra* note 2, at 149, 151–52.

and is dependent on local legislation within each jurisdiction. Many states have local laws that allow the future cancellation of a contract with a minor to protect a minor who lack maturity and discretion at the time of the agreement, or who wants to cancel or disaffirm the contract when, at an older age, he or she understands the problematic nature of the agreement.²³⁵ Because of this law, few people want to sign a contract directly with a minor, although not all states offer such protection.²³⁶ If, however, an adult signs in the minor's name, the minor usually does not have the right to cancel the agreement.²³⁷

Despite the FLSA, some jurisdictions have created special laws to protect children who sign contracts with the entertainment industry. These protections include the obligation to establish trust funds benefiting children in the entertainment industry,²³⁸ and, in appropriate cases, even

235. Hardin, *supra* note 92, at 376 (explaining that this is a consequence of the Infancy Law Doctrine, which was intended to provide a disincentive to signing contracts with minors); Hruby, *supra* note 209, at 47 (presenting the law in California); Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Infancy to Accountability*, 21 OHIO N.U. L. REV. 481, 486, 507 (1994).

236. Hruby, *supra* note 209, at 47–48 (explaining that in some states, like California, this type of regulation also applies to contracts in the entertainment industry, in order to deter people and entities from signing contracts directly with minors).

237. Krieg, *supra* note 145, at 430.

238. This is only in a few states. See Cianci, *supra* note 2, at 375–76, 379–80; Siegel, *supra* note 147, at 448. Indeed, California provides more protection to children in the entertainment industry than any other state. See Glickman, *supra* note 2, at 153, 155, 157–58. One type of trust fund is called a "Coogan Account," after a case in California where a child actor (Jackie Coogan) was left penniless at the age of eighteen. California passed a law in 1939 to ensure that 15% of a child's profits are held in a trust until they reach the age of eighteen, to give each child legal representation. A judge can also rule that 50% of the profits made by the minor should be put aside until the minor reaches the age of eighteen or is legally emancipated from his parents. The parents can keep the other 50% for themselves. See Hardin, *supra* note 92, at 380–88; Krieg, *supra* note 145, at 434–35, 440; Royal, *supra* note 11, at 459–61; Neifeld, *supra* note 11, at 460–62. This legislation allows a contract with a minor to be submitted to a court for approval, and the court has the authority to approve or reject the contract. See CAL. FAM. CODE § 6751(b) (West 1994). The court examines the contract to ascertain that it is fair and reasonable, examines the minor's financial and educational interests, and takes into account the proper development of the minor's talent and professional success at the time of the contract. Warner Bros. Pictures, Inc. v. Brodel, 192 P.2d 949, 953 (Cal. 1948). But Krieg, *supra* note 145, at 434, explains that the law did not change the situation, in that after the court approves the contract, it cannot be cancelled. Moreover, the court can establish a trust fund only if the case is brought before it, and even then the decision is up to the judge. In most cases, however, the contract is not brought before a judge in advance because the parties signing the contract with the minor do not have an obligation to do so, and therefore the law is not as effective as it should be. See also Hardin, *supra* note 92, at 378, 383, 386. California amended Coogan's Law in 2000 to provide more protection to children, but the legislation protects children in film more than children in music. Siegel, *supra* note 147, at 434; Shayne J. Heller, *Legislative Update, The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 161, 162 (1999–2000). In Florida, the money a child earns belongs to the parents because children are not deemed fit to sign a contract. In 1959, a reform based on Coogan's Law was passed because of the fear of children being exploited in the entertainment industry. According to this reform, the profits belong to the minor and not to the parents, and the minor is

appointing a legal guardian *ad litem* for this matter alone if the parents are not deemed fit.²³⁹ Because state laws are not uniform across the U.S., producers take advantage of this situation and engage in forum shopping by choosing to film in states that have less restrictive laws.²⁴⁰ One can also think of national regulatory standards to fix this problem, such as a state-centered regulatory scheme that would allow states to tailor their protections while requiring broadcasters to recognize the protections afforded to a child by his or her domiciled state. Thus, if New Mexico had more lax standards that their voters approved of, they could have more reality TV shows but could only employ children from New Mexico, or agree to abide by the higher standards of whatever other state the children came from. This may not be an ideal solution, but it may be a useful compromise for balancing community interests with children's interests.

Moreover, legislation regarding these trust funds does not apply to "docu-reality" cases.²⁴¹ In certain states, like California, there are emancipation laws that allow children, with court approval, to disconnect themselves from their parents financially if it is determined that they can

deemed fit to sign a contract in specific cases. The contract is examined to ensure that its content serves the child's interests. Children also have a closed account in their name containing their profits, which cannot be used until the child reaches eighteen or unless the court instructs otherwise. As opposed to California, the courts left the approval of the contract up to the parties. Krieg, *supra* note 145, at 439; Hruby *supra* note 209, at 51–54). Florida still has the same problem as California: if the court does not approve the contract, the profits belong to the parents. Currently, production companies and parents have little incentive to turn to the court to approve such contracts, because they are usually short-term. Krieg, *supra* note 145, at 440. New York has more comprehensive laws than any other state, and a judge may instruct that all the profits made by the minor be set aside until the child reaches eighteen. For sums above \$250,000, a trustee is appointed instead of the child's parents. Contracts cannot be approved by a court if they are for a period of more than three years. New York also has legislation from 2004 for the enforcement of labor laws, which is similar to the legislation in California in that it limits the hours of work, requires that a teacher be on set, and requires a work license. At the same time, it has fewer conditions and requirements than the California law does. See Krieg, *supra* note 145, at 440–41; Hruby, *supra* note 209, at 51; Cianci, *supra* note 2, at 379–80; Glickman, *supra* note 2, at 155 (explaining that in New York as well, it is doubtful whether these laws apply to children participating in reality programs).

239. Hardin, *supra* note 92, at 387–88 (noting that in Florida, New York, and Massachusetts, if the court has found that the parents cannot sufficiently represent their child's interests, the court is authorized to appoint a legal guardian to represent the child's interests during the approval of the contract); Levey, *supra* note 1, at 74 (noting that attempts to create similar laws for children's contracts with the entertainment industry, both federally and in Pennsylvania, where the program *Jon and Kate Plus Eight* was filmed, were not successful); Glickman, *supra* note 2, at 157–58 (describing the current legislation in Pennsylvania, which is less extensive than in the other states described above).

240. Royal, *supra* note 11, at 458–59; Cianci, *supra* note 2, at 386–87. Therefore some call for uniformity on this matter among the different states. See Neifeld *supra* note 11, at 460–62; Royal, *supra* note 11, at 453; Glickman, *supra* note 2.

241. Levey, *supra* note 1, at 74.

manage themselves independently in the best way possible.²⁴² This legislation aids children who are exploited by their parents, but it can also have considerable disadvantages. Emancipation can have a destructive effect on family relationships, harm the child, lead to inappropriate use of money, and allow others to exploit the child, although any person who has business dealings with the child can be legally subjected to a greater duty of good faith.

Therefore, child labor laws are relevant to “docu-reality” programs. For other reality programs, one can and should draw on regulations in child labor law, such as the recommendation to appoint a special guardian if the parents cannot protect their children from broadcasters or agents, and to legally establish trust funds to protect the children’s profits. These recommendations can help establish a balanced model, presented in detail below. But, it should be clear that labor laws were not intended to regulate the issue of children appearing on television programs. Specific regulation must be enacted for this purpose. Labor laws can play an important role, but they are not sufficient.

F. A comparative view of practical and desirable forms of regulation: agreements and rules, or legislation?

As noted, one of the main purposes of this Article is to examine the current conventions, ethical codes, and rules applying to media organizations. These will be compared with the desired situation and the need to regulate the field through legislation. Comparisons can also be made with regulations in other countries. Most countries that regulate this issue prefer to do it by means of agency regulations. The two examples discussed below serve to build a model.

The French regulator Conseil Supérieur de l’Audiovisuel (CSA) drafted a code to regulate the participation of children in television programs, which includes reality programs, quiz shows, investigative reports, and television series in which children participate.²⁴³ The French regulator is the High Council for Audiovisuals.²⁴⁴ Paragraph 15 of the 1986

242. Krieg, *supra* note 145, at 442–43.

243. Scripted movies are protected by French law. See Conseil Supérieur de l’Audiovisuel, *Délibération du 17 avril 2007 relative à l’intervention de mineurs dans le cadre d’émissions de télévision diffusées en métropole et dans les départements d’outre-mer* [Declaration of April 17, 2007 on minors in television programs broadcast in France and overseas], http://www.csa.fr/infos/textes/textes_detail.php?id=123002 (Fr.) [hereinafter French Code].

244. *Id.* The Council is in charge of ensuring that programs broadcast to the public on television and radio protect children, teens, and human dignity, and that programs that can harm the physical, mental, or moral development of children and teens are not distributed. *Id.*

Freedom of Communication Act gives the Council the authority to protect children and teens participating in television programs.²⁴⁵ This protection works in two ways: it protects both the viewers and the young participants in television program.²⁴⁶ The regulator permits children to participate in programs where they express their opinions. In this way, the regulator encourages freedom of expression and avoids infringing upon the freedom of contract.²⁴⁷

Children are allowed to participate under a few conditions: the parents or guardians and the child must give informed consent; the parents must be notified in writing of any matter connected with the program; the parents can, under certain conditions, take back their consent after it was given; the creators of the program must notify the parents in advance of the subject, content, and objectives of the program (this information is to be given to the parents and the children when they agree to participate in the program); the creators are not permitted to make edits that will overly dramatize the children's words or other aspects of their participation; children are not to be asked questions about problematic issues in their lives or questions that can cause embarrassment in their personal lives; the television services must avoid broadcasting revealing content about the children to prevent the risk of stigmatization of the child after the broadcast; and in cases where the child's identity is not supposed to be exposed, greater protective measures must be taken.²⁴⁸ Furthermore, the regulations govern the children's living conditions during the filming, require that they be accompanied on stage by a professional, and provide for follow-up after the program.²⁴⁹ The regulator even emphasizes that the parents' consent to their child's participation does not absolve broadcasters from their responsibility to edit and process the content according to the rules protecting the children, and that producers, editors, and franchisers must respect the children and treat them with sensitivity.²⁵⁰

The U.K. recently enacted relatively detailed legislation that deals with the conditions for granting licenses to employ children in performances.²⁵¹ Although they do not specifically refer to reality

245. *Id.*

246. *Id.* The Council convened experts from the fields of psychiatry, education, law, representatives of international foundations for children's welfare, and media and communications people to help create ethics rules in the matter.

247. *Id.* § 1.

248. French Code, *supra* note 243, §§ 3–4.

249. *Id.* § 5.

250. *Id.*

251. Children and Young Persons, (2012) § 713, 10 HALS. STAT. (5th ed.) (U.K.).

programs, several of the ordinances can be applied to reality programs as well. In addition to regulating the employable age and hours that children are allowed to work, the regulation includes many provisions such as conditions for granting licenses, not allowing children to miss school, the need for the school principal's opinion as to the compatibility of the child to participate in the show and complete classes he missed, care for the child's physical needs, the maximum number of filming days per month, periodic competence tests, and more.²⁵² Furthermore, note that Ofcom, the regulatory authority for television and radio in England, operates under the 2003 Communications Act.²⁵³ This act defines a wide range of standards for various television and radio broadcasts. For example, there are provisions that determine special protections for viewers under eighteen, as well as for children who participate in broadcasts in any way.²⁵⁴

In July 2005, Ofcom developed a broadcasting code that specifies in detail an extensive set of rules and guidelines for broadcasters.²⁵⁵ The last amended version came into force in March 2013 and contains a section dealing with children participating in reality programs.²⁵⁶ The code contains two rules regarding the participation of children under the age of eighteen in television and radio programs.²⁵⁷ Rule 1.28 requires the broadcasters take due care to ensure the physical and emotional wellbeing of the children, and maintain the dignity of the children involved in the program, all in a manner that is appropriate under the specific circumstances.²⁵⁸ There is no necessary connection between these rules and any consent given by participants, their parents, their legal guardian, or anyone over eighteen who is taking the place of the child's parents. Rule 1.29 forbids causing undue fear or distress to children under the age of eighteen through their involvement in the program or in the broadcast of a

252. *Id.*

253. Communications Act, 2003, c. 21 (U.K.), available at http://www.legislation.gov.uk/ukpga/2003/21/pdfs/ukpga_20030021_en.pdf. (defining the roles and powers of OfCom, and announcing its main objective: promoting the interests of citizens and consumers).

254. *Id.* § 319(2)(a).

255. See generally, OFFICE OF COMM. (U.K.), BROADCASTING CODE (2013), <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcastingcode2011.pdf> [hereinafter BROADCASTING CODE]. Ofcom updates the code from time to time according to technological developments and requirements arising from the field.

256. *Id.*

257. *Id.* at 14.

258. *Id.* ("Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis.").

program.²⁵⁹ Rule 2.3 discusses the level of harm to the viewers. According to this rule, broadcast content that may harm the viewers must be justified, and the broadcaster must attach information to the broadcast that will prevent or limit the harm, for example through soothing subtitles or a narrator who explains what happened.²⁶⁰ Ofcom has the ability to enforce these rules against broadcasters.²⁶¹

Following numerous complaints about children in reality programs, Ofcom published rules with detailed instructions for their application.²⁶² According to these rules, the producers and those in charge of the program are responsible for both following and ensuring that others follow these rules according to each person's role.²⁶³ The document includes directives regarding working with minors, which are relevant to the program's entire production staff, and directives about which background checks need to be conducted when choosing participants, including an examination of the child's social, family, and health situation, and what type of risk participation may pose to the child.²⁶⁴ The document also specifies what the level of protection is, with the understanding that viewers do not need to be aware of every level of protection.²⁶⁵ The desires of the viewers, the producers, and the children must be balanced with the need to protect the children.²⁶⁶ Ofcom occasionally publishes the results of its investigations into complaints of violations from which we can learn how the broadcasting authorities examine adherence to the rules. Among other matters, Ofcom investigates the methods used by the network before, during, and after filming.²⁶⁷

259. *Id.* ("People under eighteen must not be caused unnecessary distress or anxiety by their involvement in programme or by the broadcast of those programmes.").

260. *Id.*

261. *Complaints and Sanctions*, OFFICE OF COMM. (U.K.), <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/> (last visited Mar. 3, 2015) (discussing the sanctions Ofcom employs, including fines and the withholding of licenses in cases of fairness and privacy complaints).

262. GUIDANCE NOTES, *supra* note 152, at 11–14.

263. *Id.*

264. *Id.*

265. *Id.*

266. *See id.* at 11. For the study, see CHILDREN IN PROGRAMMES, *supra* note 97. Occasionally, Ofcom publishes reminders to producers and broadcasters telling them to adhere to the rules and guidelines of the code regarding the participation of children in reality programs, especially when there are violations. *See, e.g.*, OFFICE OF COMM. (U.K.), BROADCAST BULLETIN No. 220 (Dec. 17, 2012), <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb220/obb220.pdf>.

267. For example, Ofcom received sixty-six complaints about the program *I'm a Celebrity, Get Me Out of Here!*, broadcast in November 2012. OFFICE OF COMM. (U.K.), BROADCAST BULLETIN 20–38 (Apr. 8, 2013), <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb227/obb227.pdf>. The celebrity contestants were placed in an Australian jungle, completely cut off from the

Ofcom's rules join other, more general laws in Britain, such as the power of local authorities in England and Wales to grant licenses for child participation in programs that include music, dance, theatre, and film performances.²⁶⁸ Because these laws apply only to those specific performances and to specific minimum time periods, producers often know how to circumvent them so that they become inapplicable.

In some countries, like in the U.S., the main relevant legislation is contained in labor laws. In many countries the matter is not regulated at all. In the United States, the FLSA prohibits the employment of children under the age of fourteen,²⁶⁹ but this law specifically excludes children who are acting or performing in television programs.²⁷⁰ Regulation of the matter is currently left to the states. It is unclear whether children participating in reality programs need to receive approval for their participation, and only a few states have enacted legislation on the matter.²⁷¹ Some scholars have discussed the current and desired federal and state rules for reality

outer world and their families. The winner was crowned "king of the jungle." In one of the challenges, the contestants needed to choose one out of five doors to find the prize behind it. The seventeen-year-old daughter of one of the contestants was the "prize" behind one of the doors. The cameras focused on her disappointment at the fact that the door behind which she stood did not open, and there was fear that the daughter and the mother would both suffer emotional damage, especially when the mother understood that her daughter had been behind one of the doors and she had missed her. Ofcom's report concluded that rules 1.28 and 1.29 were not violated, but that rule 2.3 had been. *Id.* In another case of complaints about the program *Boys and Girls Alone*, which was broadcast on the British Channel 4 in February 2009, Ofcom published a report that same year. 2009 BROADCAST BULLETIN, *supra* note 19. The program was similar to *Big Brother* and the children's version of *Survivor*. There were many complaints about violating the rules in different areas, such as violence among children and dangerous scenes. Here, too, it was determined that rule 2.3 had been violated and the others had not. *Id.* Ofcom also handled complaints about code violations in the case of minors who suffered damage as a result of their participation on the BBC reality program *Dick and Dom's Hoopla!*. OFFICE OF COMM. (U.K.), BROADCAST BULLETIN 5-15 (Dec. 17, 2012), <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb220/obb220.pdf>. In that case, it was claimed that an eating competition that caused a girl to become disgusted and vomit was a violation of the rules. Ofcom determined that rules 1.28 and 2.3 had been violated. *Id.* Finally, Ofcom examined claims of violations in a program called *Line of Duty*, a police drama broadcast on the BBC channel in 2012. Although this was not a reality program, we can learn from the case about the application of the rules. Ofcom received complaints about two episodes in the series, both aired in July 2012. In one episode, a child played by a thirteen-year-old professional actor is present in a scene where criminals chop off a person's fingers. In the other episode, a child was interrogated by the police, and the police used coarse and vulgar language. Ofcom investigated these claims under rules 1.28 and 1.29 and found that the first rule had been violated, but that the second had not because the child did not suffer any anxiety from his participation.

268. See e.g., The Children's (Performance) Regulations, 1968, available at <http://www.legislation.gov.uk/ukxi/1968/1728/made> (Eng.); The Children and Young Persons Act, 1963, c. 37, available at http://www.legislation.gov.uk/ukpga/1963/37/pdfs/ukpga_19630037_en.pdf (Eng.).

269. See generally Fair Labor Standards Act, *supra* note 233.

270. Krieg, *supra* note 145, at 429.

271. The Children's (Performance) Regulations, *supra* note 268; The Children and Young Persons Act, *supra* note 268.

programs,²⁷² and several have recommended special regulation for those programs.²⁷³ Some scholars have argued that this recommendation is problematic because child labor laws are not sufficient.²⁷⁴ In some jurisdictions, child labor laws are irrelevant because children are not considered employees, as noted above. It is also easy to film in a state that applies these laws lightly; as such, children participating in programs should be treated according to more stringent state labor laws.²⁷⁵ As discussed earlier, one may suggest that Congress creates an interstate program that forces producers to abide by the standards of the child's domiciled state. Some scholars believe that the matter should only be addressed by Congress through a federal law, and the solution would not conflict with the children's and the network's freedom of expression; they also argue that amending the laws of the states will not be sufficient, because each state will interpret the laws differently.²⁷⁶ For the recommended law to be both effective and comprehensive, it must be enacted at a federal level to avoid exploitation in individual states, its main objective should be prevention and not correction, and the law must apply to a wide range of cases but primarily to parents. In other words, it must create an obligation for the parents more than it must create rights for the children.²⁷⁷

The call to create a special regulation for the parents is logical given the potential for harm to their children. However, the best decision-makers and the cheapest lowest cost avoiders are the broadcasters. Therefore, it seems that one should focus on them. The French Code provides proper guidance,²⁷⁸ according to which the parents' consent to have their children participate in the programs does not absolve television networks from their responsibility to edit the content and process it according to rules protecting children. Furthermore, restrictions imposed on the broadcasters will limit the number of agreements signed by fame-hungry parents. In this way, agreements or laws that apply to broadcasters will be able to influence and direct parental behavior, which could prove highly effective. As noted, in extreme and rare cases the law could allow children to file civil actions

272. See, e.g., Royal, *supra* note 11, at 455–72.

273. See generally Brenner, *supra* note 77; Cianci, *supra* note 2.

274. Ramirez, *supra* note 58, at 625–36, 650.

275. Ramirez, *supra* note 58, at 625–26 (explaining the problems with producers choosing to move production to a state with less stringent laws).

276. Royal, *supra* note 11, at 472–99 (offering this recommendation and several others). This is also the main criticism against Siegel, *supra* note 147, who suggested adopting a model that would protect the children's profits from any activity.

277. Ramirez, *supra* note 58, at 619–20, 651.

278. Cf. French Code, *supra* note 243.

against their parents.

III. THE PROPOSED MODEL: A CLUSTER OF SOLUTIONS TO THE DILEMMAS

A. The starting point: qualifying participation and considering children's rights as the guiding principle

As we have seen, the legal situation of children participating in reality programs in the U.S. is unclear. There are many sociological and legal areas related to this topic, but none of them provide sufficient answers to the existing dilemmas at the legislative or regulatory levels, including measures such as bylaws and rules of ethics.

After understanding the various damages that children participating in reality programs can sustain, the temptation may arise to implement an outright ban on children participating in reality programs, just to be on the safe side.²⁷⁹ But even if reality programs may be harmful, one should not completely ban children from participating in them. Such a ban may not be socially desirable in that it would sacrifice numerous other interests. There is room for a balanced model. But taking into account a child's sensitivity and vulnerability along with clearly distributional matters, the focal point of the balance must be the child's rights. The deterrence factor is also important because broadcasters are often in a better position to make safety decisions, so imposing liability and obligations on the broadcasters instead of the parents or program's caregivers, provides the broadcasters with an incentive to double-check the staff employed by their programs, whether the families are fit to participate, to take additional safety measures in filming and broadcasting, and to help rein in the parents' greed for fame.

Therefore, children's participation in reality programs should be strictly qualified according to the list of parameters presented below. This means that when the rights to commercial freedoms of expression and speech clash with the children's rights to privacy and dignity, the latter must supersede the other rights. This does not mean that one should necessarily rule out all instances of children participating in any prototypes of reality programs, at any age, and in any situation, but rather that one should strike an appropriate balance. Based on this point of departure, this Article will examine the least harmful alternatives in each instance, together with the ability to control the type and measure of exposure.

Why do children's rights need to be considered paramount? The rationale is mostly distributional and one of deterrence. There is no doubt

279. Royal, *supra* note 11, at 472.

that children are generally vulnerable and weak, especially when facing broadcasters. Unlike children, broadcasters are powerful and rich, and they are backed by the advertisers who fund them. They are also repeat players whereas children are usually only one-time players, which makes the broadcasters experienced and arms them with a great deal of knowledge and regular legal counsel, while it makes children far more susceptible to loss.

A healthy society depends in part on the health of the children who grow up in the society; the best way promote rights in a democratic society is to cherish the rights of individuals that will soon make decisions about privacy. If children grow accustomed to a lack of privacy, they will be used to a diminished expectation of privacy when they are the societal leaders.

The main parameters of our examination are: (a) child and parental consent; (b) short- and long-term damage versus the benefits to both individuals and the public; (c) the length of exposure; and (d) the relevance of the child's age. Several recommendations are suggested within this model. Some of the recommendations are new and original, whereas others call for adopting ideas that have been recommended or presented elsewhere. Some ideas appear in French and British regulations, particularly those of Ofcom.

B. Regulating the field using soft intervention: between non-intervention and strict legislation

The question arises whether one should allow both the market and existing legislation, such as labor or tort laws, to take their course in seriously qualifying child participation in reality programs, with possibly some additional pressure from the public and advertisers. The answer is that after many years of problems arising from children taking part in such programs, and from the various scandals that have developed over the years, we see that children's participation has not been qualified, at least not in a sufficient manner, and the situation is likely to worsen. Non-legislative regulations could have implications for the interpretation of tort or contract laws, and fill existing lacunae, for example, in the area of appropriate and reasonable standards. Regulation can prevent civil lawsuits, not merely provide compensation after the fact. Thus, one should aim for prevention through regulation specifically aimed at broadcasters in an attempt to avoid harm. This type of prevention includes recommendations on improving existing legislation, as well as various initial rules and provisions aimed at the best decision-makers: broadcasters and their advertisers.

One type of soft regulation could employ various regulatory measures

in each jurisdiction, at least initially, before creating specific legislation on the rights of children participating in reality programs. These regulations would apply to all types of programs, including those with child participants who did not necessarily consent to be there, such as in *Nanny 911*. The regulations should be of a contractual nature, such as promulgated rules, and because of their consensual nature, they should be legally binding. They must include an explicit stipulation that contracts or agreements with children bind *all* the parties who sign them, rather than just the broadcasters. This includes the franchisers, the channels, the children, and their families. Moreover, if any one of the agreement's material conditions is breached, it no longer binds the participants, who can then renege on their commitments. This includes the ability to quit filming or veto the broadcast. Provisions in the contract requiring participants to inform the producers as soon as possible about their intent to quit are both logical and consistent with the requirement of good faith.

A few years after these agreements take effect, a specially appointed committee should examine the situation and decide whether there is a need to promote legislation on the issue, or whether the regulations are sufficient. If during the second stage the situation requires legislation, the same regulations recommended in this Article as the basis for a convention should serve as the basis for a law. Naturally, the law should also provide legal remedies. If no law is enacted, it will be necessary to establish an independent review committee, or some other system that has the authority to settle complaints about violations of the codes and conventions.²⁸⁰ This includes determining sanctions and identifying the entity that will impose and enforce those sanctions. There should also be an appeals organization, perhaps to a state appellate court. If the committee is retained after the law is enacted, its functions should be regulated either by the law itself or by statutory arrangements. It will also be necessary to determine whether the rulings will be published. Decisions should be published with the parties' names omitted to further protect the children involved.

Why are soft regulations initially preferable instead of immediately switching to legislation? Given the power of the broadcasters and advertisers, is it not a foregone conclusion that the agreements will not be upheld, and that the organization handling the violations and sanctions will not be effective? A realistic understanding of the situation demands making an attempt at soft regulation in the first stage, with the threat of legislation in the background. If the regulations do not prove effective, the second stage, based on the same provisions and rationale, should be implemented.

280. Possibly in a manner somewhat similar to the British Ofcom.

Moreover, enacting a law can take a long time. This type of law must be sufficiently detailed. One can assume that various forces in the legislature will be pulling in different directions, and that broadcasters and advertisers will deploy lobbyists to prevent legislation or weaken regulations. By comparison, a convention can take effect immediately and can be broader. An initial convention is more realistic, and broadcasters are aware of the roadblocks facing legislation. However, with the threat of legislation looming in the background, they will be more likely to cooperate with soft regulations. An additional benefit of a convention is that an agency would be able to adapt the regulation much more quickly than a statute could be modified. In states that already have legislation, the suggested convention will serve to improve the legislation.

C. Limitations based on age and the question of involving children and adults as participants

Another aspect of children's rights and interests arising from fourth parameter presented in Part III.A is the need to limit the age of the children participating in any reality program. The limitation would apply to children below kindergarten age.

A younger child is less prepared for television exposure and its implications. Such a child is more vulnerable, even if his school friends may not tease him as much as, say, teenagers (although the opposite scenario is also imaginable). One can also assume that the child's consent is not real, and we cannot always honor the parents' consent on the behalf of the child.²⁸¹ Therefore, for each prototype, one must examine whether, at a given age, in combination with the length of exposure, the exposure to reality television can be harmful. If we determine that it is, we must examine whether the exposure should be barred in its entirety or whether it can be allowed subject to limitations and conditions. For example, the length of the exposure can be shortened. Alternatively, if the child loses a certain competition, the viewers may be shown the child's journey, practice sessions, and preparation. In this way, the viewers will not only see the child's failure.

Some argue that all children should be prohibited from being on reality programs because they do not have the ability to choose what is best for them, as they lack life experience and sound judgment. Because children have many other ways of expressing themselves, limiting their freedom of expression on this point does not violate their First Amendment

281. Cf. CHILDREN IN PROGRAMMES, *supra* note 97, at 19.

rights.²⁸² This determination is too rigid because it depends on the child's age and on the evolving capacities principle mentioned in the UNCRC. This principle also affects the child's real consent and the parents' consent. Such consent is not possible for younger children, and one cannot always count on the parents to act in their child's best interest when giving their consent. But, real consent may be possible as the child matures. The evolving capacities principle is also affected by the short- and long-term damages that could be caused to young children.

Therefore, according to the evolving capacities principle and its effects, one should ban the participation of young children and determine the age at which children can start participating in such programs (perhaps eight or nine is appropriate). Children must have some degree of maturity before they are allowed to participate, subject to the other recommendations included in this Article. In practice, the younger the children are, the more reason there is to prevent their participation. As the child becomes older, the limitations will be relaxed, though not entirely. A scale must be created that applies stricter scrutiny to younger children and lighter scrutiny to older children. For example, among the other limitations discussed here, younger children should be given closer psychological guidance, have the option to leave the program at any point without sanctions, and have the right to allow their families to veto some or all of the footage.

Adults and children should not be permitted to compete together at the same time, which occurs in talent competitions such as *America's Got Talent*. This type of mixture is unreasonable, and it is probably intended to attract viewers and advertisers because children's participation is appealing. It is important to gradually adapt the program to the child's age; it is unreasonable to combine young children in the same program with circus acrobats or women in skimpy clothing. Therefore, subject to the conditions and limitations raised in this Article, one must have competitions that are only for children.

D. Employment relationships and insurance obligations

One of the distributional aspects of children's rights is reflected in the clear determination that a child participating in a reality program be considered the employee of the network, and not an independent contractor, or as having a special contract or any other status.²⁸³ The contractual agreement should expand upon the laws proposed above

282. Royal, *supra* note 11, at 475, 497.

283. Cf. Blair, *supra* note 12, at 3–5; Royal, *supra* note 11, at 453–55.

without derogating from them. It may make sense to distinguish between programs such as *Kid Nation*, where the children are on the set for weeks at a time, and between programs in which the children show up for a given number of hours and are accompanied by their parents. But, given the difficult nature of filming days, the work could also match the requirements of an employment relationship.²⁸⁴ Moreover, special intermediate categories may be established.²⁸⁵ All of these situations must be tested based on employment relation standards. But all the children's reality programs, and possibly also the adult ones, including programs like *Nanny 911* that currently are not subject to any child labor laws, and "docu-reality" programs like *Jon & Kate Plus Eight*, which document family life,²⁸⁶ should provide working rights of the highest order. This is because the children are *de facto* scripted, even if their regular life is being filmed and the program is trying to help them through therapy, they are still likely to be exploited by the broadcasters and their parents.

The child's status as an employee significantly affects the possibility of a contractual or tortious lawsuit in case of work accidents, as well as the employer's responsibility to provide a safe work environment in general. It also affects the employer's responsibility to prevent damage caused by other contestants. This means that the employer is liable for choosing participants who endanger their environment, or if the participants were not properly screened because of the producer's negligence. Indeed, granting both children and adults participating in reality programs employee status can cause the broadcaster to take more safety precautions when choosing and screening contestants, and leads the broadcaster to become the best decision-maker.

Even if certain troublemakers are more likely to raise the ratings and sell commercials, broadcasters will be deterred from hiring people who are likely to cause damage so as to avoid legal trouble. Applying an employment relationship in these cases can expose the employer to liability for negligence if it does not maintain a safe work environment,²⁸⁷ and force the employer to protect participants from sexual harassment on the set.²⁸⁸ These issues are important because if people participate in activities deemed abnormally dangerous, their rights cannot be waived; as a matter of public policy, they retain the right to sue for damages, even if they

284. Cf. Ramirez, *supra* note 58, at 650.

285. Cf. Neifeld, *supra* note 11, at 449–50; Blair, *supra* note 12, at 2.

286. Glickman, *supra* note 2, at 150.

287. Blair, *supra* note 12, at 8.

288. Cf. Tiffany, *supra* note 129, at 16.

seemingly waived that right.²⁸⁹ Qualifying all reality program participants as employees is also important to the problem of viewing a minor's consent as informed consent.

The employee's status also affects several other matters, including the possibility of suing for damages caused during the audition period;²⁹⁰ the validity of the consent and the fact that the consent cannot contradict labor laws; unlimited filming hours and unlimited live and late night broadcasts; and the violation of the obligation to provide children with private teachers at the expense of the network so that they can make up for their missed studies.²⁹¹ There are various grounds for possible tort lawsuits against broadcasters when participants qualify as employees.²⁹²

Labor laws must also address the content of the programs, and not allow children to participate in programs that include sexual or negative content. In this regard one can explicitly adopt the laws and rules reviewed above, which apply these rationales in other circumstances, to reality programs.

Moreover, to the extent possible, programs should be filmed during vacation periods and not during the school year. If filming is conducted during the school year, the broadcaster must provide suitable private teachers so that children can make up lost material. Here too, the regulation must be aimed specifically at the broadcasters, because the parents may not enforce the rules and allow their children to miss many days of school because of filming.

Employment relationships are important for several other reasons as well. Employment relationships and well-drafted contracts can affect who receives the profits from the program's merchandise. Employment relationships can also influence another important question regarding the period of filming and its aftermath: can the producers coerce the children into making publicity appearances at events and on television shows to promote the program whether or not they are earning money for it? Labor laws could limit these appearances, especially if children do not wish to do them. The parents may have agreed to these because they wanted to participate and were not carefully considering the aftermath of the program. Labor laws must also provide options for *de facto* refusals, without making

289. Ugolini, *supra* note 12, at 77; Blair, *supra* note 12, at 10.

290. Cf. Tiffany, *supra* note 129, at 27.

291. Cf. Neifeld, *supra* note 11, at 448. New York has such legislation. See Krieg, *supra* note 145, at 441.

292. Blair, *supra* note 12, at 14–18 (listing a few such causes of action, including negligence, wrongful imprisonment, intentional or negligent infliction of emotional distress, and the economic torts of fraud and misrepresentation, which are less likely to be successful).

these refusals a breach of contract.

It is important, therefore, to use labor laws correctly as part of the package of protections available to children in reality programs. But note that one must be wary of sweeping laws that warn against child labor in general. Despite the social importance of these laws, in practice employers, including broadcasters, often succeed in circumventing them, eventually harming children precisely because labor laws do not apply to them.

Furthermore, despite the importance of labor laws and their contribution to the recommendations in this Article, it is clear that they cannot provide a comprehensive solution to the dilemmas outlined here, and there is a need for more specific regulation or legislation. Therefore, regulations need to include provisions derived from labor law, or similar to provisions typical of labor law, which protect children's rights regarding the various aspects reviewed and recommended here, even if it will not be a complete application of the labor laws for each prototype. Indeed, in prototypes in which the child's relationship with the broadcaster resembles an employment relationship based on the length of the employment and the hours of filming per day, as in the case of children's survival programs, it makes sense to apply labor laws comprehensively in addition to any regulations. For programs in these prototypes, the contracts signed with parents and their children must include an explicit application of the labor laws in order to remove doubt.

Finally, for all of the various prototypes, one must insist that children be insured at the expense of the producers in amounts that correlate with possible harms. Contracts containing provisions that waive the broadcaster's liability for damages above the sum covered by the insurance, which on their face seem especially discriminatory, should not be tolerated.

E. Detailed consent forms for each prototype

The issue of informed consent, the first parameter listed in Part III.A, is a crucial one. The informed consent of the child, parents, or guardians for the child's participation in the program must be granted after they have received a full explanation of the program, including the fact that the child does not have to participate, in a way that the child can understand. Therefore it is necessary to develop detailed consent forms for parents and children in simple language that the child can understand, with translations if necessary, that are adapted to each program prototype.²⁹³ These forms must include the option of revoking consent at any point, for any reason, and with no sanctions. Producers must take these costs into consideration,

293. Cf. Hruby, *supra* note 209, at 53–55.

despite the harm to their commercial freedom of expression. The forms must give children and parents the option of making comments and expressing reservations about how the show is edited, and they should have the option to make changes, and veto edits before the broadcast.²⁹⁴ Sample consent forms should be attached as exhibits to the various rules and conventions.

Moreover, approval should be given by an independent body²⁹⁵ because one cannot always depend on the parents' judgment. The right to control the broadcasting of certain scenes and to prevent biased editing is rooted in the basic need to protect one's reputation. A fundamental balance should be struck between this right and the freedom of commercial expression: the child cannot control all stages of editing, and producers can insist on keeping scenes that do not cause harm or injustice, and that do not present the child in an incorrect or partial manner. In these cases, it is necessary to have an obligation to notify the child and the parents or guardians that when they reach a certain stage or event, they will not be able to withdraw their consent. If an independent entity decides disputed cases, a proper balance can be achieved.

Another recommendation for the relevant prototypes is that humiliating or embarrassing audition tapes, especially those where the judges laugh at the contestant in front of them or behind their backs, expecting the viewers to enjoy the humiliation of the contestants, should be archived and not broadcast.²⁹⁶ Despite the temptation to broadcast embarrassing and tearful moments, it would be better if these were kept away from viewers, because the harm to the participants may be great.

Moreover, children and their families should be given the opportunity to watch and approve a pilot program before intensive filming begins.²⁹⁷ Content that may be problematic should be filmed in the pilot and shown to an independent audience whose response would be monitored and who would answer a questionnaire. All of this should be mandatory.²⁹⁸

294. Cf. French Code, *supra* note 243, § 2.

295. Neifeld, *supra* note 11, at 459.

296. Lisa Lundy, Amanda Ruth & Travis Park, *Simply Irresistible: Reality TV Consumption Patterns*, 2 COMM. Q. 208 (2008) (arguing that viewers consider extensive humiliation to be an essential part of reality programs).

297. Cf. CHILDREN IN PROGRAMMES, *supra* note 97, at 23 (recommending that Ofcom approve the final, edited program).

298. *Id.* at 5 (recommending to do so in order to examine compliance with Ofcom's code).

F. Examining the child's emotional strength: the need for an initial professional examination, and the need for guidance even after filming

Because of the great potential emotional damage that can occur from exposure in each prototype, certain steps must be taken to prevent or at least minimize these damages. As a condition of filming, the emotional strength of the child and his family, as well as the level of support in the environment, should be examined professionally by an independent psychologist, at the broadcaster's expense.²⁹⁹ In programs that are filmed over time, such as children's survival shows or programs like *Junior MasterChef*, the child's consent must be confirmed again when the child is in the midst of the filming and understands what is happening.³⁰⁰ This is less relevant to short-term appearances in programs such as *America's Got Talent*. The producers may also be required to introduce the children to contestants from past seasons who have already gone through the experience so they can ask questions.³⁰¹

Children should also receive psychological guidance throughout the program and for a few months after filming has ended. This should be required especially for those prototypes in which the filming is long and intense in accordance with the third parameter in Part III.A—examining the damage to the child as well as the duration of the exposure. The broadcaster should pay for all of this.³⁰² In relevant prototypes, therapy should not end with the broadcast if there is need to continue it. Professional counseling would be helpful, as well as individual counseling for specific children, and physical and emotional testing based on the relevant program prototype. This could be a helpful requirement contained in the contract signed before filming, especially if it were an unconditional obligation.³⁰³ Reaching a professional decision would require polling family members to see if any of them are opposed to the filming. Even if a child's capabilities can be tested, there is no guarantee that the child will be able to transition to routine life unscathed after the high-intensity period of filming and the climax of the broadcast.

Furthermore, the filming should be conditioned on the children and their parents receiving a statement of approval from school regarding the

299. Cf. Neifeld, *supra* note 11, at 457–58.

300. Cf. GUIDANCE NOTES, *supra* note 152, at 13 (recommending that those responsible for the program should regularly confirm that the child agrees).

301. Cf. CHILDREN IN PROGRAMMES, *supra* note 97, at 19.

302. Cf. Neifeld, *supra* note 11, at 462.

303. See CBS, *Eligibility Requirements for CBS' Pirates Project*, <https://web.archive.org/web/20061231015533/>. Practices exist for reality programs, but are not mandatory. Blair, *supra* note 12, at 10.

children's ability to catch up with schoolwork if they were to be away from school for a long period of time. Filming should also be conditioned on receiving a statement of approval from the children's pediatrician regarding their physical and emotional fitness, after the children have waived their medical confidentiality. If any cost is involved, it should be borne by the broadcaster. Finally, for some prototypes, one should consider making consent conditional on having the school's educational staff closely follow the program, or even accompany the participants during filming.

G. Guides, companions, and caregivers

It is recommended that an adult guide be present on the set at all times to supervise and prevent accidents, which can arise from short- and long-term damages. The child should have a familiar person on the set, such as a teacher, parent, or guardian, who is in charge of the child's welfare. If a family member cannot be present, the program staff should appoint a person who will accompany the child throughout the production and care for the child's welfare. The child's parents or guardian should have access to this person.³⁰⁴

The presence of the child's parents, although not mandatory, should be allowed. It should not be mandatory because some parents are in difficult situations or cannot miss work,³⁰⁵ and because the presence of parents may create additional stress for some children. Therefore, the person should be someone with whom the child is familiar, but not necessarily the parent. There should also be an option for the parents to hire an independent guide unconnected to the producers but nevertheless funded by them. This type of older babysitter or aide can accompany a child or several children, which could relieve some of the financial burden on the producers. In prototypes such as *America's Got Talent*, which is usually a one-time short filming session, it is highly desirable to require that the child's parents themselves be present.

For programs that are led by therapists, such as *Nanny 911*, the therapists must be supervised, and their credentials checked. Therapists should also undergo specific training before the broadcast. In the relevant prototypes, the judges, producers, and editors who have regular contact

304. Cf. GUIDANCE NOTES, *supra* note 152 (stating that, when it is practical, it would be wise to work with one regular contact person with whom the participant can communicate during the production). Ofcom recommends that the suitable person be in charge of the participant's wellbeing during the production. *Id.* Ofcom also recommends that the broadcasters be aware that in certain circumstances minors may benefit from having a person familiar to them, such as a parent, brother, friend, or teacher, present on the set. *Id.*

305. Cf. Krieg, *supra* note 145, at 438.

with the children should also undergo such training. The training should include learning how to communicate with children, how to criticize them, how children deal with competition, stress factors, and failure, how to identify crises in children, how to identify when children should be referred to a professional for examination if there is a fear of a crisis, what the possible damages to children participating in reality programs are, and how to prevent these damages. Possibly even make-up artists and stylists should undergo some training, so that children are dressed and made up according to their age, and so that these individuals do not make insensitive comments to the children. Such training should be mandatory and periodically repeated.³⁰⁶ Even though it is not recommended, one can also assume that in programs where children and adults participate together there will be a less protective attitude towards the children, and therefore proper advance training is even more important for those programs.

Regardless of their training and qualifications, therapists should not be held personally liable for harm to children, even if in practice the therapists were the ones who had directly committed a tort or breached the contract. Instead, liability should be imposed on the franchisers and producers, who have deeper pockets. This determination will provide broadcasters with the incentive to supervise the therapists and check their credentials and actions more carefully. This is appropriate not only from a deterrence perspective, but also from a distributional one, because such a scheme places financial liability on broadcasters directly, separate from traditional vicarious liability. One must remember that broadcasters always have the ability to remove scenes, so they definitely control the means of prevention.

For each relevant prototype, one must examine whether there is a need for suitable professional guidance and whether these professionals should be attached to the production team. For example, a “closed” production like *Kid Nation* requires that a doctor be attached to the production team, but a program like *America’s Got Talent* may not need one, although high-quality professional services should be readily and quickly available. Possibly, there should be an obligation to have a physician or emergency medical technician on the set of programs where there is a higher risk of bodily injury, like *Junior MasterChef*, where children may be injured while cooking, or in a program like *America’s Got Talent* if participants perform stunts. Moreover, a psychologist or a psychiatrist should conduct a competence test for participation in the program to determine whether

306. Cf. GUIDANCE NOTES, *supra* note 152, at 12 (describing the need for “development of documented guidelines”); see also CHILDREN IN PROGRAMMES, *supra* note 97, at 5 (recommending training interviewers on how to interview children in a sensitive and supportive way in order to prevent them from being humiliated.).

children are able to do these stunts safely.

Finally, the qualifications and credentials of the professional staff accompanying the program should be examined. For example, a physician or psychologist examining the participants before the broadcasts must be certified, and if by law they must belong to a certain professional association, then they must present their diplomas and certifications. It should be agreed in the contract that the care they provide is independent and free of pressure on the part of the producers, so that if a physician determines that a participant should be removed, or if a psychiatrist determines that a participant needs to leave, or even that the program should be cancelled, the producers will not have the right to intervene.

At the same time, the producers should not be absolved of liability for damages that occurred as a result of manipulative or incorrect treatment. If they are absolved, they may be induced to simply watch from the sidelines and try to shift liability exclusively to the caregiver, for example in a situation where a physician prescribes psychiatric drugs for the participants. In other words, even if the producers are not involved in dispensing the drugs or managing their side effects or dosage, they may still be liable for harm that results from the participant's drug induced state because they failed to choose a suitable or sufficiently skilled professional team. In certain cases they may also be vicariously liable for the torts committed by these professional teams. Some questions of medical ethics are also relevant in this regard, including the question of the professionals' responsibility toward the producers who hired them versus their responsibility toward the participants; whether a reality program participant should be treated with psychiatric drugs on the set instead of in a clinic and in an organized manner after being taken off the program temporarily (for example, with the option of family visits even if program bylaws forbid meeting people on the outside, as is the case with the *Big Brother* and *Survivor* programs); the need for a second professional opinion, even in "closed" programs; and whether in these cases there is room to create special ethics rules for doctors, psychologists, and other relevant professionals, or whether the existing rules are sufficient.

H. Balancing the type and measurement of exposure, and examining less harmful alternatives

A key recommendation is the need to balance and control the type and duration of exposure for each program prototype and age group. This cannot be divorced from the other recommendations, which are mostly related to possible damages (the second parameter in Part III.A), the length of the exposure (the third parameter), and the child's age (the fourth

parameter). Here, too, the power of the broadcasters should be mitigated for distributional reasons, and the type of exposure and its duration should not be determined unilaterally.

There is no comparison between broadcasting one episode, even if it is ruinous, and documenting years of a child's life in the framework of a reality program that continually portrays the family's life, regularly invades a child's privacy, and causes the child emotional harm. Therefore, the duration of the exposure can also affect the other two parameters concerning consent and the damage caused by the exposure. Even if an expert could point to damages caused from a relatively short broadcast, it stands to reason that the longer the exposure, the greater risk of damage to the children, unless some mechanisms are adopted to correct this. Naturally, it is not sufficient to examine the length of the exposure alone; the nature and type of exposure must also be considered. One should also take into account that broadcasts can be viewed on various other media for an unlimited period of time, even if the exposure itself was relatively short.

At the same time, it is also possible that longer exposure of the children's life may portray them in a more positive light, whereas programs such as *Nanny 911* often show children only in their moments of disgrace for about an hour, programs such as *America's Got Talent* may present the children as failures for two or three minutes. Proper regulation should also attempt to control this parameter to minimize the damage as much as possible. Internet companies that host videos may be the best decision-makers and cheapest cost-avoiders in detecting and removing copyright violations. They can simply refuse to allow re-runs in order to avoid damaging a child's rights, and a heavy enforcement of copyright would reduce the number of illegal video copies on the Internet.

Edited broadcasts should be required instead of live ones. The editing itself must not be selective, in the sense that it should not only present the extreme and the bad. As noted, participants should have the option of commenting and stating their reservations about the editing process, and to use their veto rights before the broadcast. Moreover, publishing unedited and unapproved scenes on the Internet, as many programs often do, should be prohibited.³⁰⁷ It should also be forbidden to film contestants on talent competitions when they are going on and off the stage, especially in humiliating moments. Recording every word competitors say, including their frustrations and cursing, even at public relations events, should also be prohibited. In this matter, one must settle for approaching contestants with the microphone and asking them direct questions about their feelings or

307. Cf. Neifeld, *supra* note 11, at 454.

reactions; this signals to the participants clearly and concretely that they are being filmed and recorded. Moreover, these directives need to be explicitly applied to trailers. Trailers must be balanced, not garish, and content should not be shown without context.

The children being filmed must be allowed to veto a broadcaster's right to broadcast re-runs and upload content to mobile phones and the Internet. Admittedly, broadcasters may incur heavy losses as a result, but producers and franchisers need to take this into account. Children are not regular participants and employees, and therefore the risk must be placed on the more powerful entities for a better distributional effect.

Furthermore, children and their families, as well as professional consultants, must be allowed to archive embarrassing auditions for talent competitions. They must also be allowed to remove scenes in which judges ridicule the contestants. Moreover, cases in which contestants are given medical or other attention following physical or emotional distress may not be filmed or broadcast. If such a case occurs on a live broadcast, it must be stopped until the treatment is over.

According to the second parameter in Part III.A, one must also examine other, less harmful, alternatives to broadcasting the full names and pictures of the children. Possible alternatives are the attempt to achieve the same or reasonably similar results using actors, blurring children's faces,³⁰⁸ or removing especially problematic and harmful scenes. The option of blurring children's faces or of using actors should be examined especially for the program *Nanny 911*, because there the Nanny is being called from the outset to treat families with so-called problematic children who misbehave. It is common and reasonable to blur the faces of children and even adults when they appear in embarrassing situations, such as in a news story about poverty, even when it is obvious that the broadcast is generally for their benefit. The use of actors is also a possibility, although, of course, in this case it is no longer reality television. It is clearly difficult for viewers to watch a program for an extended period of time when the faces of some of the participants are blurred. Implementing this recommendation would lower ratings. Therefore, a distinction might be made for different age groups, according to the fourth parameter and the aforementioned recommendations regarding the children's ages. Very young children should have their faces blurred, or they should not be allowed to participate at all. Older children, if they agree to be fully exposed and demonstrate that they understand the meaning of their participation, should be allowed to do so, subject to the other recommendations in this Article. If older children

308. Cf. CHILDREN IN PROGRAMMES, *supra* note 97, at 23 (proposing to hide children's identities).

are embarrassed or humiliated during the broadcast, their faces can be blurred throughout the entire broadcast, or the embarrassing scenes should be edited out. Therefore, efforts must be made not to use live broadcasts, which would foil this recommendation.

In light of the length of exposure there should not be full and regular documentation of the children's lives as part of portraying the life of the family in the series. A single episode can have a ruinous effect on a child's life if the child is presented briefly, in a negative light, and in a manner that does not wholly represent him. But the potential harm to the child's privacy and feelings is vastly increased with long and regular exposure.³⁰⁹

I. The need to establish trust funds for the profits

There are often conflicts of interests between parents and their children, and many cases in which parents financially exploit children who have made a great deal of money from programs, movies, and merchandise sold to the public following the programs. A trust fund mechanism should be established. The mechanism would allow parents to use only a specified amount of the profits, based on a certain calculation, and would require that a large part of the profits be locked until the child reaches the age of maturity. Such a provision would be based on considerations of distribution and deterrence to prevent parents and managers from exploiting children. Certain states, mainly California and New York, provide a good example because they have similar laws about special trust funds. But, because these laws are not uniform in all states, producers may choose to film in states that have less restrictive legislation.

Establishing a trust fund, however, is not sufficient, and there is need for legislation to prevent the circumvention of the fund's arrangements and protections. For example, court approval of the contract should not be required to establish the fund. Moreover, an arrangement must be reached that determines the percentage of the money that would remain locked in the fund until the minor reaches adulthood, and the percentage that can be withdrawn immediately. Courts should have the discretion to deviate from that law, as needed. Locking the entire fund would not make sense, given the large expenses incurred by parents over the course of their child's participation in the programs, for example, as a result of missing work during filming.

It is also necessary to examine whether parents should be the trustees of the fund, or whether it is necessary to appoint someone from outside the family. Arrangements should be in place to address a potential conflict of

309. Royal, *supra* note 11, at 446, 487–89.

interest. As noted, in New York it was determined that parents may serve as trustees for funds up to a certain amount; for higher amounts an external trustee is appointed. A fund of this type would preserve the child's profits and minimize damages. As Levey points out (cynically, one can assume): "[l]et's just hope that some of the profits that have been earned off of these children's on-camera performances will be there for therapy, or at least a getaway car, if either proves necessary for the next 'big' little reality stars someday."³¹⁰

J. Broadcasters' obligations toward viewers

Most of the recommendations and proposals in this Article are aimed at protecting children and their parents' rights vis-à-vis broadcasters, although some are also aimed at protecting children from their parents. But the viewers' rights also need to be protected, since without viewers the program would not exist. This can happen if, for instance, the program does not provide viewers with enough information about the safety measures taken to protect children, which could cause anxiety among viewers.³¹¹

As such, two more recommendations are proposed. One is to require that the broadcaster, in therapy and parental training prototypes such as *Nanny 911*, add a disclaimer to warn the public not to rely on what they see on the program and to seek individual counseling instead. It should be clear, however, that adding disclaimers does not free the broadcaster from any of the other duties imposed on it. Although in many cases this will have no effect on the viewers, it should be done even if only a few families will take such warnings to heart.

Second, a discussion should be held in the studio following the broadcast of therapy-type programs, similar to the personal, group, or parental training session that can be found in investigative programs. The discussion should cover the good and bad things that occurred in the broadcast, and contain recommendations about what should and should not be adopted with the understanding that there are no magic results and that results are usually achieved only after hard and persistent work. One can also consider a separate discussion about the various programs on television, radio, and the Internet, if sufficient demand exists. These discussions would not necessarily be held right after the broadcast but they would be more widespread. At some point after the broadcast, viewers should be able to communicate with professionals over the phone, e-mail, text, or chats on a given forum, so that viewers can discuss the matters

310. Levey, *supra* note 1, at 75.

311. BROADCASTING CODE, *supra* note 255, at 8.

arising from the broadcast and bring up their own similar problems.

These recommendations should not be detached from the others, and do not constitute retroactive validation of the harm caused to children. Moreover, it is clear that in the age of the Internet and smart set-top boxes, viewers will be able to skip this part of the broadcast and in practice nullify these recommendations. Nevertheless, they should still be implemented, if only for those people who will not skip the discussions and will watch them as part of the broadcast. Moreover, a short but comprehensive discussion with experts could still attract viewers.

IV. CONCLUSION

Children's participation in reality programs must be regulated. This will help with the regulation of children in television programs in general, as well as with the regulation of adults in reality programs.

Regulation should begin with soft regulations, such as agreements, rules, and conventions modeling the French and British Ofcom regulations. If soft regulations do not succeed, advocates should pursue stricter regulation through legislation. Regulation is for the benefit of participants and viewers, and ought to lead to decreased litigation and damages costs.³¹² It is true that some of the recommendations above would result in significant expenses for producers and franchisers. But these costs should be directly or indirectly absorbed by the deep pockets of businesses that profit from these programs, such as producers, franchisers, broadcasters, and advertisers. Requiring parents or children to absorb the cost of regulation does not make distributional or economic sense. As a market, they already generate a great deal of revenue. Because regulation would bring a certain amount of stability to the market and also save some of legal expenses, following a brief adjustment period, broadcasters will not suffer from the implementation of these provisions.

There is also a need for an entity that would, first and foremost, limit participation while also supervising, controlling, and imposing sanctions on broadcasters as needed. This entity may need to exert similar control over parents as well, albeit in extreme and rare cases. To prevent damage to children participating in reality programs, child participation needs to be limited as much as possible. But if such participation is necessary culturally and in order to balance other rights, programs such as *America's Got Talent* should be produced only with the guidance of a psychologist on the set, and child and adult participants should be separated. Programs such as *Nanny 911* and *Junior MasterChef* should be broadcast after considering the

312. Cf. Brenner, *supra* note 77, at 899–900.

conditions and qualifications listed in this Article, and actors should be used, or the children's faces should be blurred, in order to prevent severe potential harm. In addition to the other qualifications listed in this Article, the therapist's credentials should be examined and a discussion should be held in the studio following the broadcast.

Programs such as *Kid Nation* should be banned completely, because they do not pass the proposed threshold on almost any parameter. If they are not banned, it is of paramount importance to regulate this prototype, given that participants are locked away from the outside world for a certain amount of time. Naturally, any program that presents sexual or violent content violates the children's rights, as well as good taste.

These conclusions arise from the discussion of the four parameters described in Part III.A, their application to each of the three prototypes in Part I, and the presentation of a cluster of recommendations at various levels, some derived by comparison with British and French regulations or the UNCRC. The purpose of the discussion was to reach a balanced model that is based on the child's best interests as well as cultural interests. This balance should not be foreign to American law, which has intensively defended both workers' and children's rights.

My hope is that this Article will serve as the basis for regulating the relatively new but already urgent issue of children participating in reality programs. I also hope that it will help develop the field, define its boundaries, and contribute to making the linkage between the law, children, and communication.