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## NOTES

# THE RESEARCHER'S SECOND LABORATORY: PROTECTING OUR CHILDREN FROM SOCIAL SURVEYS IN PUBLIC SCHOOLS IN LIGHT OF *FIELDS* *V. PALMDALE SCHOOL DISTRICT*

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### I. INTRODUCTION

Vanessa Shetler was shocked to learn what her eight-year-old son went through one seemingly ordinary day in his third-grade class. After coming home from school, Ms. Shetler's son informed his mother that instead of spending the day learning math and reading, he was asked by the school how frequently he thought about having sex or touching other people's "private parts."<sup>1</sup> Had these questions been presented as part of a routine sex and health education program for elementary school students, perhaps Ms. Shetler would not have been so upset. These questions, however, were not a part of such a program. Instead, the school, in collaboration with a mental health counselor, distributed a survey

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1. Karen Maeshiro, *Sex Poll Outrages Parents; Preteens Surveyed*, DAILY NEWS OF L.A., Jan. 19, 2002, at AV1. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1201-02 & n.3 (9th Cir. 2005), *amended and reaff'd*, 447 F.3d 1187 (9th Cir. 2006).

containing numerous sexually charged questions to some of its students.<sup>2</sup> The survey asked students how often they thought about washing themselves because they felt dirty inside or if they ever had “sex feelings” in their bodies, for example.<sup>3</sup> What is more, it asked if they ever thought that they touched their own “private parts” too much and if they ever could not stop thinking about sex.<sup>4</sup>

Ms. Shetler was just one out of many parents who became outraged because of the survey and believed that the questions were “putting poison into kids’ minds” because it discussed sex and other subjects that third graders should not be learning about.<sup>5</sup> The survey was not given solely to third graders, however—first and fifth graders were also asked to answer these same questions.<sup>6</sup> The school claimed that the survey was designed to establish a baseline for measuring trauma in children, for the purpose of ascertaining any impediments to the students’ abilities to absorb material in school.<sup>7</sup> Unpersuaded by the school’s rationale, parents claimed that the survey was inappropriate and, in response, filed suit against the school district.<sup>8</sup>

Emotions surrounding the incident intensified as the case garnered more and more national attention. In June 2005, the Ninth Circuit Court of Appeals ruled in favor of the defendants and held that the school district did not violate any of the parents’ constitutional rights.<sup>9</sup> In a highly controversial opinion that spawned many critiques, Justice Reinhardt held that there is “no fundamental right of parents to be the *exclusive* providers of information regarding sexual matters to their children”<sup>10</sup> and explained that “parents have no due process or privacy right to override the determinations of public schools as to the information to which their

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2. Maeshiro, *supra* note 1.

3. *Fields*, 427 F.3d at 1201 n.3.

4. *Id.*

5. Maeshiro, *supra* note 1.

6. *Id.*

7. *Fields*, 427 F.3d at 1200, 1209–10.

8. See Jennifer Jackson, Op-Ed, *Sex-ed Ruling Removes Parents’ Voice*, DAILY COUGAR (Univ. of Houston), Nov. 7, 2005, available at <http://www.stp.uh.edu/vol71/50/opinion/oped2.html>.

9. For a sampling of the different media responses spurred by the Ninth Circuit’s decision, see Trevor Bothwell, *Judicial Activism No Better from the Right*, WASH. TIMES, Dec. 11, 2005, at B05; Ruth Marcus, Editorial, *Parents, Children, Sex and Judges*, WASH. POST, Nov. 27, 2005, at B07; Phyllis Schlafly, *Activist Courts Protect Mental Health Screening of Children in Public Schools*, COPLEYS NEWS SERVICE, Nov. 15, 2005.

10. *Fields*, 427 F.3d at 1200.

children will be exposed while enrolled as students.”<sup>11</sup> Predictably, many parents were shocked when the Ninth Circuit dismissed the claims.

It is hard to say that the parents’ reactions were unfounded, particularly because the opinion’s logic and reasoning contained many flaws. Perhaps the most significant is that the justices incorrectly characterized the issue by failing to consider that the survey was not administered for educational purposes; rather, the survey aimed to use young children as unwitting subjects in a larger social research project.<sup>12</sup> In failing to recognize this point, the court may have incorrectly limited the constitutional rights of parents and their children in an educational context.

Yet this situation is not a new one. For many years, parents have attempted to reaffirm their constitutional rights in raising and educating their children. Over half a century ago, the Supreme Court established that, as a general proposition, parents do possess a constitutionally cognizable interest in their children, and specifically, in raising and educating them.<sup>13</sup> The Court, however, has struggled to define the exact parameters of the parents’ interest, reasoning that it does not exist without boundaries.<sup>14</sup> As a result, parents’ rights have waned in the face of schools’ interests, and parents often find inadequate protection under the Constitution.

Recognizing this limited nature of constitutional parental rights, the U.S. Congress has passed numerous statutes designed to strengthen the rights parents have to protect their children, particularly in situations where children are used as subjects of social research in public schools. For instance, the Family Educational Rights and Privacy Act (“FERPA”) requires schools to allow parents to inspect certain educational materials used by a school.<sup>15</sup> Moreover, the Protection of Pupil Rights Amendment (“PPRA”) requires schools to obtain parental consent before the administration of surveys that seek certain personal information, such as

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11. *Id.*

12. See Jackson, *supra* note 8 (noting that the survey was not about sexual education but was used to “merely . . . provide the school district with information”). This Note uses the terms “social” and “social science” interchangeably—these terms include the study of topics such as “physical and sexual abuse, depression and suicidal tendencies, running away from home, gang behavior, substance abuse, teenage pregnancy, and exposure to AIDS.” Barbara Stanley & Joan E. Sieber, *Introduction: The Ethics of Social Research on Children and Adolescents*, in SOCIAL RESEARCH ON CHILDREN AND ADOLESCENTS: ETHICAL ISSUES 1, 1 (Barbara Stanley & Joan E. Sieber eds., 1992).

13. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

14. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 164, 166–67 (1944) (holding that a state’s interest in protecting children from economic exploitation overrode parents’ exercise of First and Fourteenth Amendment rights).

15. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2000).

information relating to mental or psychological problems or sexual behavior.<sup>16</sup>

Due to the linguistic loopholes in the statutes, however, these two Acts were not successful in carrying out their goals of giving parents protection because schools have found simple ways to avoid the requirements of the statutes.<sup>17</sup> To make matters worse, other sources of protection have similarly failed. Though federal departments and agencies have implemented regulations that require a set protocol to be followed when certain types of research are conducted, these regulations have limited applicability since they apply only to federally funded research.<sup>18</sup> On the state level, many states have yet to pass laws that address social research using children in public schools, and in some of the states that have, those laws are limited.<sup>19</sup> And along the same line, parents are unlikely to find any relief under the common law.<sup>20</sup> Thus, under the legal regime as it stands today, parents are unable to adequately protect their children from social research in public schools.

This issue is extremely problematic because of the inherent vulnerability of children. Though social research in public schools does not kill or physically harm children, a carelessly planned and executed research project can “upset and worry” them and their parents, as well as embarrass or betray them “by making false promises.”<sup>21</sup> More importantly, however, improperly conducted research on children may cause them enduring mental and emotional damage, and researchers focusing on even seemingly ordinary and innocuous research may stumble upon risky behavior.<sup>22</sup> Consequently, parents have a strong interest in protecting their children

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16. Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h(b) (2000).

17. See Beth Garrison, Note, “*Children Are Not Second Class Citizens*”: Can Parents Stop Public Schools from Treating Their Children Like Guinea Pigs?, 39 VAL. U. L. REV. 147, 200 (2004) (“[B]y following the PPRA’s express language, schools can evade the statute in its entirety.”).

18. E.g., Protection of Human Subjects, 34 C.F.R. §§ 97.101, 97.102(e) (2006) (stating that federal protection for human research subjects promulgated by the secretary of education applies only to research “conducted, supported or otherwise subject to [specific types of] regulation by any federal department or agency”); Protection of Human Subjects, 45 C.F.R. §§ 46.101, 46.102(e) (2005) (stating a similar restriction in the Department of Health and Human Services’ policy).

19. See *infra* Part IV.C.

20. See Judith Areen, *Legal Constraints on Social Research with Children*, in SOCIAL RESEARCH ON CHILDREN AND ADOLESCENTS: ETHICAL ISSUES, *supra* note 12, at 7, 13–14 (“[F]ederal regulations are arguably more protective of the interests of minors than the common law.”).

21. Priscilla Alderson, *Ethics*, in DOING RESEARCH WITH CHILDREN AND YOUNG PEOPLE 97, 99 (Sandy Fraser et al. eds., 2004).

22. Stanley & Sieber, *supra* note 12, at 1 (“Even while studying youngsters in the context of family, school, or institutional life when the *intended focus* of the research seems innocuous, it is not unusual for the investigator to happen upon high-risk behavior.”).

from this type of research. Yet under the current legal system, parents have very little power to do this, and researchers consistently use students more and more as subjects of social research in public schools.<sup>23</sup> Parents need some alternate form of protection, a form of protection that unfortunately does not yet exist.

This Note argues that to prevent situations like the one Vanessa Shetler faced, and as a matter of public policy, state legislatures should take an affirmative step to require local school boards to adopt policies regulating the administration of surveys in public schools. In particular, it uses the recent case of *Fields v. Palmdale School District*<sup>24</sup> as a vehicle to analyze parental rights within the context of using children in public schools for social research. Though the children's rights are, of course, also important issues, this Note focuses primarily on parental rights, since parents have traditionally used their own rights as a vehicle to protect their children's interests.

The rest of this Note continues in five parts. Part II describes the evolution of parents' constitutional rights under the Fourteenth Amendment, as well as modern applications of these rights to specific educational contexts, such as health and sex curricula and contraception distribution programs in schools. Part III examines the recent case of *Fields v. Palmdale School District* and argues that although both the district court and Ninth Circuit mischaracterized the parents' claims in that case, the decisions were likely correct in finding no due process violation under the Fourteenth Amendment. Part IV then examines current federal and state statutes, as well as federal regulations, intended to protect humans who are used as subjects of social research, and offers several reasons why these laws are ineffective in affording protection to parents. Part V then proposes a solution that would address some of the shortcomings of the current legal system in this context. Specifically, it argues that state legislatures should require all local school districts to adopt policies regulating the administration of all social surveys in public schools, and proposes basic issues that local policies should ideally address. Finally, Part VI offers some concluding remarks.

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23. For example, Virginia, Minnesota, Ohio, Connecticut, New York, and New Jersey are among the states that administered potentially impermissible surveys to public school students within the past several years. See HB-Rights.org, The Protection of Pupil Rights Amendment (PPRA), <http://www.hb-rights.org/5parents/ppra> (last visited Mar. 13, 2007).

24. *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217 (C.D. Cal. 2003), *aff'd*, 427 F.3d 1197 (9th Cir. 2005), *amended and reaff'd*, 447 F.3d 1187 (9th Cir. 2006).

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## II. A CONSTITUTIONAL BACKDROP: THE FOURTEENTH AMENDMENT IN SCHOOLS

### A. THE FOURTEENTH AMENDMENT AND SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment of the U.S. Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>25</sup> Following this guarantee, the Supreme Court has found certain rights of individuals to be so “fundamental” that the government may not infringe upon them without a sufficiently compelling reason. These include the right to marriage,<sup>26</sup> procreation,<sup>27</sup> certain sexual activity,<sup>28</sup> medical care decisionmaking,<sup>29</sup> and custody of one’s children.<sup>30</sup> Similarly, the Court has recognized a woman’s “liberty interest”<sup>31</sup> in access to abortions.<sup>32</sup> Though none of these rights are explicitly stated in the Constitution, the Court has often found that they are implied in the text as part of the liberty protected by the Liberty Clause of the Fourteenth Amendment.<sup>33</sup>

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25. U.S. CONST. amend. XIV, § 1.

26. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

27. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

28. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

29. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

30. *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982).

31. When analyzing substantive due process claims under the Fourteenth Amendment today, the Supreme Court often refers to “liberty interests” as opposed to “fundamental rights,” which some scholars believe results in a weakened standard of review. *See, e.g., Dale Carpenter, Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1140 (2004).

32. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 851 (1992) (plurality opinion). *See also Roe v. Wade*, 410 U.S. 113, 153 (1973) (“Th[e] right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”). In defining the scope of a woman’s fundamental right to an abortion, the Court in *Roe* established a trimester framework that purported to balance the relative interests of the woman seeking an abortion and the state seeking to protect potential life. *Id.* at 164–65. Although *Casey* later explicitly overruled *Roe*’s trimester framework analysis, it nonetheless “retained and once again reaffirmed” the “essential holding” of *Roe*. *Casey*, 505 U.S. at 846. *Casey* did not explicitly articulate a standard of review, however, though its holding that a state may not place “undue burden” on a woman’s access to an abortion may be viewed as a form of intermediate scrutiny because of the Court’s deference to the state’s “substantial interest” in protecting potential life. *See id.* at 876.

33. *E.g., Casey*, 505 U.S. at 846. *See also Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court in *Griswold* found that although there is no explicit right to privacy emanating from the Constitution, the Bill of Rights contains penumbras that create fundamental rights though they are not explicitly enumerated. *Id.* at 484. Accordingly, the Court struck down a state law that prohibited the use of contraceptives. *Id.* at 485–86. Additionally, the Court may also find rights implied by the Liberty Clause of the Fifth Amendment, which also provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend V.

When faced with a newly defined right, the Court has had to grapple with the question of whether to classify it as a fundamental right,<sup>34</sup> though it has been more willing to find a right to be fundamental when that right is “deeply rooted in this Nation’s history and tradition.”<sup>35</sup> When it does find a fundamental right, it typically applies strict scrutiny if the law at issue directly and substantially interferes with the right.<sup>36</sup> While this analysis is neither concrete nor explicitly defined, a challenged law will be struck down unless the government can demonstrate a compelling interest.<sup>37</sup> Whether an interest is compelling or not is determined on a case-by-case basis; the Court has held that a compelling interest includes winning a war and protecting harm to the United States,<sup>38</sup> as well as protecting children.<sup>39</sup> If the Court finds a compelling state interest, it will uphold the state’s action if it is narrowly drawn to further the state’s interests.<sup>40</sup> In other words, unless there is a less restrictive and equally effective means of serving the state’s compelling interest, the Court will not invalidate the state’s action.

Today, much uncertainty underlies the Fourteenth Amendment, and questions constantly arise as to whether a right constitutes a fundamental right, or whether a state’s interest is compelling.<sup>41</sup> Thus, it is hardly

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34. This constant question is illustrated by Justice Rehnquist’s plurality opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (plurality opinion). In that opinion, Justice Rehnquist criticized the *Roe* analysis: “[T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms . . . . The key elements . . . are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle.” *Id.* at 518.

35. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977). Justice Cardozo, almost forty years before *Moore*, explained that a right is fundamental when it is “implicit in the concept of ordered liberty,” but he also suggested that a determination of whether or not a right is fundamental requires a consideration of whether the abolishment of the right would violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 794 (1960).

36. *Zablocki v. Redhail*, 434 U.S. 374, 387 & n.12 (1978). The Court has used an “undue burden” test instead of a strict scrutiny analysis on at least one occasion. See *Casey*, 505 U.S. at 876–77. Although an “undue burden” test is usually considered an intermediate form of scrutiny and thus not synonymous to strict scrutiny, the Court showed the test’s strength by striking down a spousal notification provision for abortions in *Casey*. See *id.* at 892–95.

37. E.g., *Roe*, 410 U.S. at 155.

38. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (suggesting that the goals of war constitute a compelling interest).

39. See *Zablocki*, 434 U.S. at 388 (suggesting that the protection of children could constitute a compelling interest).

40. E.g., *Roe*, 410 U.S. at 155 (explaining that legislative enactments that seek to govern fundamental interests must be “narrowly drawn”).

41. See ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 764–68 (2d ed. 2002) (noting that many issues under the Fourteenth Amendment leave questions yet to be answered).

surprising that this Amendment has been the subject of much litigation. In the context of parental rights particularly, the right of parents to control their children's upbringing and education under the Fourteenth Amendment has historically been, and continues to be, a topic of heavy debate.<sup>42</sup>

## B. PARENTAL RIGHTS AND LIBERTIES IN SCHOOLS

Although the Fourteenth Amendment does not specifically enumerate parental rights as a fundamental right, the Supreme Court has held that parents' rights to control the upbringing and education of their children are protected by the U.S. Constitution. Thus, the Court has consistently held that states cannot intrude upon these rights absent a strong reason for doing so.

### 1. Establishment of Parental Rights

The right of parents to bring up their children was first recognized in *Meyer v. Nebraska* in 1923.<sup>43</sup> In *Meyer*, a schoolteacher was convicted of teaching German to a ten-year-old boy in violation of a statute that prohibited teaching foreign languages to students before they passed the eighth grade.<sup>44</sup> In holding that the statute violated parents' Fourteenth Amendment rights, the Court explained that liberty under the Constitution "denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>45</sup> The Court also explained that though the state had a legitimate goal of promoting civic development by encouraging children to learn English, its means were inappropriate because it coerced individuals by means in conflict with the parents' constitutional rights.<sup>46</sup>

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42. See William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 177 (2000) (claiming that the role of parents in their children's education has been "an issue that has created recorded controversy since Plato advocated the communal rearing of children").

43. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

44. *Id.* at 396–97.

45. *Id.* at 399.

46. *Id.* at 400–01. *Meyer* has often been studied alongside *Farrington v. Tokushige*, 273 U.S. 284 (1927). In *Farrington*, the Court invalidated a Hawaiian statute that prevented classes from not only being taught in Japanese, but also teaching the Japanese language itself. *Id.* at 291–97. Specifically, the Court held that the law impermissibly infringed upon a parent's "right to direct the education of his own child without unreasonable restrictions." *Id.* at 298. For an analysis of *Meyer* and *Farrington* alongside each other, see Miranda Perry, Comment, *Kids and Condoms: Parental Involvement in School Condom-distribution Programs*, 63 U. CHI. L. REV. 727, 731–32 (1996).

Just two years later, the Supreme Court reaffirmed the notion of fundamental parental rights in *Pierce v. Society of Sisters* when it struck down an Oregon law that required children between eight and sixteen years of age to attend public schools.<sup>47</sup> Relying on *Meyer*, the Court held that the law unreasonably interfered with the liberty of parents to direct the upbringing and education of their children, who were not mere “creature[s] of the State.”<sup>48</sup> And although the state had an important interest in requiring schools to meet certain education standards, it could not intrude upon the parents’ right and duty to raise their children in such a burdensome manner.<sup>49</sup>

Although *Meyer* and *Pierce* are now often interpreted as First Amendment cases,<sup>50</sup> they nonetheless together established that parents have a fundamental liberty interest in raising and educating their children.<sup>51</sup> Yet neither case explicitly delineated the parameters of this liberty interest and how much parents could defer to their own judgments or beliefs in opposing a state’s actions.<sup>52</sup> It was not until almost twenty years after *Meyer* and *Pierce* were decided that the Supreme Court began to address and analyze a state’s interest alongside those of parents.<sup>53</sup> Not surprisingly, although parents today have a fundamental liberty interest in rearing their children, this interest does not exist without limits. In fact, the Supreme Court has commonly engaged in the balancing of opposing parties’ interests, and in the case of parental rights, there are some situations where the states’ interests may override the parents’ control of their own children.

In *Prince v. Massachusetts*, for example, the Court held that a state’s interest was sufficient to supersede parents’ interests in their children when it upheld a law that prevented children from selling magazines despite parental claims of constitutional violations.<sup>54</sup> A guardian of a nine-year-old

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47. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 536 (1925).

48. *Id.* at 534–35.

49. *See id.* Indeed, the Court noted that “those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.* at 535.

50. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 95 (2000) (plurality opinion) (Kennedy, J., dissenting) (“*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles of protecting freedom of speech, belief, and religion.”).

51. *See* CHEMERINSKY, *supra* note 41, at 778–79 & n.73; Camille Waters, Note, *A, B, C’s and Condoms for Free: A Legislative Solution to Parents’ Rights and Condom Distribution in Public Schools*, 31 VAL. U. L. REV. 787, 801 (1997) (“Parents’ rights to raise children have been implicitly recognized as a fundamental liberty interest.”).

52. *See* Perry, *supra* note 46, at 732 (noting that the cases “do not . . . address what steps parents can take to prevent the state from encroaching on the parental domain”).

53. *See* *Prince v. Massachusetts*, 321 U.S. 158 (1944).

54. *Id.* at 170.

girl objected to the law because it prevented the girl from selling magazines for Jehovah's witnesses, claiming it impinged on both the guardian's and the child's constitutional rights.<sup>55</sup> Although the guardian's claims were grounded in both her free exercise right under the First Amendment and her parental liberty interest under the Fourteenth Amendment, the Court noted that neither right existed without limitation. The Court explained that in "[a]cting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."<sup>56</sup> The Court then proceeded to balance the parental interest in rearing children against the state's interest in protecting them from "economic exploitation,"<sup>57</sup> ultimately deciding that the state's interest was sufficiently important to limit parents' exercise of their First and Fourteenth Amendment rights with respect to their children in this way.<sup>58</sup>

The tension between the rights of parents and the interests of the state are also illuminated in *Wisconsin v. Yoder*,<sup>59</sup> which involved a law that, while facially neutral with respect to parental rights, significantly hampered the authority of the Amish and Mennonite parents to whom it was applied. In that case, Wisconsin convicted certain parents for refusing to send their fourteen- and fifteen-year-old children to school when the law required attendance until the age of sixteen.<sup>60</sup> The parents claimed that subjecting Amish and Mennonite children to school past the eighth grade was contrary to their religious teachings and consequently sought relief under the Free Exercise Clause of the First Amendment.<sup>61</sup> The Court balanced the parents' claim against the state's interest in maintaining an educational system.<sup>62</sup> While ultimately basing its decision to reverse the parents' convictions upon the Free Exercise Clause, the Court relied heavily on *Meyer* and *Pierce*, thereby reaffirming the importance of parental liberty interests.<sup>63</sup> In particular, it explained that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the

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55. *Id.* at 159–60, 164.

56. *Id.* at 166 (footnotes omitted).

57. *Id.* at 164 n.7 ("Appellant's brief says: 'The purpose of the legislation is to protect children from economic exploitation and keep them from the evils of such enterprises that contribute to the degradation of children.'").

58. *Id.* at 167–71.

59. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

60. *Id.* at 207.

61. *Id.*

62. *See id.* at 213–14.

63. *See id.* at 232–34.

upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>64</sup>

Thus, the Court has consistently affirmed the dichotomy between *Meyer* and *Pierce* on the one hand and *Prince* on the other by recognizing that although parents do have a fundamental liberty interest in raising their children, that interest must, in certain situations, yield to important state interests. Because the Court has not established any bright-line rule to determine when a state has impermissibly intruded on these parental liberty interests, parental rights have been heavily litigated.<sup>65</sup> Indeed, attention to courts’ treatment of parental rights has increased in the wake of recent controversies surrounding mandatory contraception distribution programs and other components of sex education curricula in public schools.

## 2. Sex and Health Education Programs

Given the relatively high number of adolescents contracting the HIV virus and other sexually transmitted diseases on a yearly basis, it is unsurprising that schools began to take a larger role in educating their students about the risks of sexual activities in the past few decades.<sup>66</sup> The exact content of the education varies greatly among schools<sup>67</sup> and ranges from the reading of sexually explicit books to promoting the use of condoms.<sup>68</sup> At least one public high school in Massachusetts had taken an

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64. *Id.* at 232. The Court was not unanimous in its decision, however. Noting that the other justices failed to consider the children’s own interests, Justice Douglas dissented, criticizing the majority opinion for concluding “that the matter [was] within the dispensation of parents alone.” *Id.* at 241 (Douglas, J., dissenting). Douglas acknowledged that children themselves have constitutionally protectible interests, and wrote that “[o]n this important and vital matter of education . . . children should be entitled to be heard,” especially in situations where the views of the parents could potentially stand in stark contrast to those of the children. *Id.* at 244. Thus, after noting that it is the child’s judgment, and not the parent’s, “that is essential if we are to give full meaning to what we have said about the Bill of Rights,” *id.* at 245, Douglas recommended remanding the case so that the views of the children could be heard, *id.* at 246. Notably, Justice Douglas was the sole justice in the decision to acknowledge and ardently argue for the constitutional rights of children themselves.

65. See Perry, *supra* note 46, at 734 (“[C]ompeting interests of the parents and the state often gives rise to litigation.”).

66. Katrina Fisler, Note, *Parents’ Role in Their Children’s Sex Education Undermined: United States Court of Appeals for the First Circuit Allows Sexually Explicit Educational Program in Public High School Without Advanced Notice to Parents*—Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995), 29 RUTGERS L.J. 339, 339–40 (1998). For a detailed analysis of the role that the increase in HIV and AIDS played in the growing popularity of mandatory sex and health education classes, see generally Kristen S. Rufo, Note, *Public Policy vs. Parent Policy: States Battle over Whether Public Schools Can Provide Condoms to Minors Without Parental Consent*, 13 N.Y.L. SCH. J. HUM. RTS. 589 (1997).

67. See Fisler, *supra* note 66, at 341.

68. *Id.*

even more controversial approach in educating students about sex by leading a “group sexual experience, with audience participation.”<sup>69</sup> Despite schools’ use of such aggressive and questionable techniques, however, courts have consistently held that mandatory sex and health education in public schools are constitutional.

For example, in *Brown v. Hot, Sexy & Safer Productions, Inc.*, the First Circuit held that parents do not have a “right to restrict the flow of information in the public schools,”<sup>70</sup> including information given out during sex education sessions. Parents of some high school students had filed a complaint alleging a violation of their right to direct the upbringing and education of their children after learning that the children participated in a sex education program where the instructor used offensive language that allegedly embarrassed some students.<sup>71</sup> In reexamining *Meyer* and *Pierce*, the court held that although parents may not be prevented from choosing a specific path of education for their children, they do not have a right to dictate the curriculum at the school to which they have chosen to send their children.<sup>72</sup> It further explained that the right of parents to dictate or challenge objectionable features of school curriculum would impose a great burden on state educational systems.<sup>73</sup> Thus, it ultimately held that because *Meyer* and *Pierce* do not encompass a broadly defined “right to restrict the flow of information in the public schools,” sex education programs do not violate parents’ liberty interests in raising and educating their children.<sup>74</sup>

Most courts today have agreed with *Brown*’s holding that parents’ constitutional rights are not violated by requiring students to attend sex and health education programs in public schools.<sup>75</sup> In particular, they reason

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69. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (internal quotations omitted).

70. *Id.* at 534.

71. *Id.* at 529. Based on this type of language used during the session, the parents of the children also claimed a violation of their privacy right to be free from exposure to offensive language. *Id.* at 534. The court found that no such fundamental privacy right exists, however. *Id.*

72. *Id.* at 533–34.

73. *See id.* at 534.

74. *See id.* The court also denied the plaintiffs’ other claims, such as those relating to procedural due process rights afforded by the Fourteenth Amendment and those of sexual harassment. *Id.* at 537, 541.

75. It is important to note, however, that parental claims of constitutional violations in this context have been denied under both the First and Fourteenth Amendments. *See, e.g.,* *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 342, 344 (D. Md. 1969) (holding that a sex education program in schools did not raise any constitutional question under the First or Fourteenth Amendments); *Hopkins v. Hamden Bd. of Educ.*, 289 A.2d 914, 916, 924 (Conn. C.P. 1971) (holding that a mandatory health course that included sex education and family life did not sufficiently infringe upon free exercise or

that to give parents the power to choose particular programs to include or omit in their children's education "would be a power of disorganizing the school, . . . practically rendering it substantially useless"<sup>76</sup> and that "public education is committed to the control of State and local school authorities."<sup>77</sup> Furthermore, courts have consistently held that nonmandatory health education programs do not even present a constitutional issue because they allow parents to opt their children out of the programs if they so choose.<sup>78</sup>

### 3. Contraception Distribution Programs

Stressing that solely teaching abstinence to adolescents is ineffective, schools have also implemented programs to distribute contraceptives to students as a supplement to sex and health curricula.<sup>79</sup> Parents have opposed such programs with arguments that condom availability programs promote promiscuity and suggest to students that they are expected to have sex, and that such programs conflict with moral teachings at home in violation of the parents' Fourteenth Amendment right to control the upbringing and education of their children.<sup>80</sup> Schools have countered by

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parental privacy rights to warrant an award of a temporary injunction). *But see* *Ware v. Valley Stream High Sch. Dist.*, 550 N.E.2d 420, 422 (N.Y. 1989) (denying the defendant's motion for summary judgment because genuine issues of material fact existed concerning the burden imposed on the plaintiffs' right to religious exercise by the exposure to AIDS curriculum); *Valent v. N.J. State Bd. of Educ.*, 274 A.2d 832, 840–41 (N.J. Super. Ct. Ch. Div. 1971) (holding that summary judgment was precluded because of issues concerning whether public schools requiring children to attend sex health courses violated the plaintiffs' constitutional rights, including free exercise rights).

76. *Davis v. Page*, 385 F. Supp. 395, 406 (D.N.H. 1974) (quoting *Kidder v. Chellis*, 59 N.H. 473, 476 (1879)).

77. *Ware*, 550 N.E.2d at 425. The court continued: "The Commissioner of Education and local officials are vested with wide discretion in the management of school affairs." *Id.* See also *Curtis v. Sch. Comm.*, 652 N.E.2d 580, 584 (Mass. 1995) ("Public education of children is unquestionably entrusted to the control, management, and discretion of State and local school committees.").

78. *E.g.*, *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68, 81–82 (Ct. App. 1975) (holding that a parent's ability to remove his or her children from sex education precluded a finding of constitutional violations); *Medeiros v. Kiyosaki*, 478 P.2d 314, 317 (Haw. 1970) (holding that because parents had the option of withdrawing children from sex education, their constitutional right to privacy was not violated).

79. See Karl J. Sanders, Comment, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms in Public Schools*, 61 U. CIN. L. REV. 1479, 1479 (1993) (noting that recently, "some school boards have concluded that textbooks alone are insufficient to combat the public health issues of today; rather, educational efforts must be supplemented by proactive measures to ensure the availability of condoms to any student who wishes to engage in sexual activities").

80. *Rufo*, *supra* note 66, at 589–90. See also *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 261–62 (S. Ct. App. Div. 1993) (acknowledging that opponents of condom availability programs in schools are concerned that such programs would "condon[e] promiscuity and sexual permissiveness," thereby encouraging sex among adolescents at an earlier age).

arguing that parents need to accept that their children are having sex, and that it is a school's responsibility to make sure the students are safe.<sup>81</sup>

To date, only a handful of courts have directly addressed the issue of whether it is constitutional for public schools to make condoms available to students. Unfortunately, these courts have reached conflicting results. In *Alfonso v. Fernandez*, a New York court held that a condom availability program infringed on parents' rights to rear and educate their children as they see fit.<sup>82</sup> Specifically, the court held that distributing condoms in a school environment, where parents were required to send their children, infringes upon parents' rights to make sensitive decisions by essentially allowing students means to engage in sexual activity.<sup>83</sup> The court subjected the school's action to strict scrutiny and, after finding that students may easily obtain condoms elsewhere, ultimately held that continuing such a program without allowing parents to opt their children out violated the parents' rights under the Fourteenth Amendment.<sup>84</sup>

On the other hand, a Massachusetts court took a seemingly opposite view in *Curtis v. School Committee* when it held that a school's condom distribution program did not violate parents' liberty interests.<sup>85</sup> The court explained that because the school did not force or coerce the students into accepting the condoms, the program did not burden the parents to an extent that would constitute an unconstitutional infringement of the parents' interests.<sup>86</sup> Thus, the school was free to continue its program without notifying parents or allowing them to opt out.<sup>87</sup> Indeed, the Third Circuit tracked the reasoning of *Curtis* three years later in *Parents United for Better Schools, Inc. v. School District* by holding that a condom distribution program "did not offend parental rights regarding the custody and care of their children" precisely because it was voluntary.<sup>88</sup>

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81. Rufo, *supra* note 66, at 590.

82. *Alfonso*, 606 N.Y.S.2d at 265–67.

83. *Id.* at 266. The court distinguished its case from a case in which a condom availability program was held constitutional in a health clinic because a school, unlike a health clinic, was a place where parents were forced to send their children. *Id.*

84. *Id.* at 266–67. The court also held that the program constituted a health service and did not infringe upon the parents' free exercise of religion. *Id.* at 267–68.

85. *Curtis v. Sch. Comm.*, 652 N.E.2d 580, 586 (Mass. 1995).

86. *Id.* at 585–86.

87. *Id.* at 587.

88. *Parents United for Better Schs., Inc. v. Sch. Dist.*, 148 F.3d 260, 277 (3d Cir. 1998). Specifically, the court explained: "Because we conclude the program lacks any degree of coercion or compulsion in violation of the plaintiffs' parental liberties, or their familial privacy, we conclude . . . that neither an opt-out provision nor parental notification is required by the Federal Constitution." *Id.* (internal quotations omitted) (quoting *Curtis*, 652 N.E.2d at 587).

Today, the constitutionality of condom distribution plans in public schools continues to be heavily debated, and given the increasing popularity of such programs,<sup>89</sup> the debate is likely to continue. Nonetheless, though courts have reached conflicting opinions as to the constitutionality of such programs, they do agree on one important idea: parents have some fundamental liberty interest or right when it comes to raising and educating their children.

### III. A MISGUIDED DECISION: *FIELDS V. PALMDALE SCHOOL DISTRICT*

Just last year, parents faced another uphill challenge in *Fields v. Palmdale School District* when a district court in California and the Ninth Circuit Court of Appeals displayed manifest unwillingness to expand parental rights under the Fourteenth Amendment.<sup>90</sup> In what will likely be one of the most controversial cases concerning parental rights, both courts essentially held that parents have no constitutional rights against a school that decides to administer sexually explicit surveys to elementary school children. This Part of the Note first summarizes the district court and Ninth Circuit opinions. It then argues that although both decisions incorrectly analyzed the constitutional issue, they were probably ultimately correct in finding no Fourteenth Amendment violations resulting from a school administering a social research survey to students without prior parental consent.

#### A. THE FACTS

The case began when a mental health counselor sought to administer a “psychological assessment questionnaire” to first, third, and fifth grade students at Mesquite Elementary School in California.<sup>91</sup> With permission of the school, the counselor sent letters to the parents of the children asking for “support in participating in a district wide [*sic*] study of our first, third and fifth grade children.”<sup>92</sup> The letter indicated that the survey’s goal was

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89. See Douglas B. Kirby & Nancy L. Brown, *Condom Availability Programs in U.S. Schools*, 28 FAMILY PLANNING PERSPECTIVES 196, 196, available at <http://www.guttmacher.org/pubs/journals/2819696.pdf>. The study shows that as of the mid-1990s, already 431 public schools in fifty U.S. school districts made condoms available to their students. *Id.*

90. See *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217 (C.D. Cal. 2003), *aff’d*, 427 F.3d 1197 (9th Cir. 2005), *amended and reaff’d*, 447 F.3d 1187 (9th Cir. 2006).

91. *Id.* at 1218.

92. *Id.* at 1219 (alteration in original) (internal quotations omitted) (quoting Complaint at para. 29, Exhibit D, *Fields*, 271 F. Supp. 2d 1217).

to “establish a community baseline measure of children’s exposure to early trauma (for example, violence)” and requested consent regarding the children’s participation.<sup>93</sup> Although it warned that “answering questions may make [a] child feel uncomfortable,” it never disclosed the exact contents of the survey.<sup>94</sup> In reliance upon the representations of the letter, most parents permitted their children to participate in the survey, which the school administered in classes a few weeks later.<sup>95</sup>

Unsurprisingly, the parents became more than upset when their children informed them of the precise nature of the survey; they claimed that they were never informed that their children would be asked to respond to questions relating to sex and sexual behavior, such as those asking the children to rate the frequency of engaging in certain activities or having certain thoughts, such as “Touching my private parts too much” and “Thinking about having sex.”<sup>96</sup> The parents, believing such questions to be inappropriate and highly offensive given the age of the children, filed a complaint, alleging “[v]iolations of their federal constitutional right to privacy,” “[v]iolations of their state constitutional right to privacy,” “[d]eprivation of their civil rights pursuant to 42 U.S.C. § 1983,” and negligence.<sup>97</sup>

#### B. THE DISTRICT COURT OPINION

In reviewing the case, the district court first recharacterized the federal right to privacy claim as a substantive due process claim under the Fourteenth Amendment.<sup>98</sup> It then proceeded by determining whether the parents’ asserted liberty interest in “control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs” qualified as a fundamental right under the Fourteenth Amendment.<sup>99</sup> The court turned to

93. *Id.* (internal quotations omitted) (quoting Complaint, *supra* note 92, at para. 27).

94. *Id.* (internal quotations omitted) (quoting Complaint, *supra* note 92, at para. 30, Exhibit D).

95. *Id.* (emphasis omitted) (quoting Complaint, *supra* note 92, at Exhibit C).

96. *Id.* at 1219–20. Specifically, the survey asked students to rate the frequency with which they engaged in certain activities on a scale ranging from “never” to “almost all the time.” *Id.* at 1219. These activities include “Touching my private parts too much”; “Thinking about having sex”; “Thinking about touching other people’s private parts”; “Thinking about sex when I don’t want to”; “Washing myself because I feel dirty on the inside”; “Not trusting people because they might want sex”; “Getting scared or upset when I think about sex”; “Having sex feelings in my body”; “Can’t stop thinking about sex”; and “Getting upset when people talk about sex.” *Id.*

97. *Id.* at 1220.

98. *Id.* at 1220 n.4.

99. *Id.* at 1220 (alteration in original) (internal quotations omitted) (citing Complaint, *supra* note 92, at para. 42).

precedent and reiterated the notion that the liberty afforded under the Amendment generally includes “the right to make decisions regarding the care, custody, and control of one’s children” and “the right to direct the education and upbringing of one’s children.”<sup>100</sup> It then explained, however, that the parents’ specific asserted liberty interest was “not ‘deeply rooted in this Nation’s history and tradition’ . . . such that ‘neither liberty nor justice would exist if [it] were sacrificed,’”<sup>101</sup> and noted that the seminal cases, *Meyer* and *Pierce*, did not give parents a fundamental right to control a public school’s curriculum.<sup>102</sup> Accordingly, the court dismissed the parents’ federal constitutional right to privacy claim.<sup>103</sup> It also dismissed the parents’ claim under 42 U.S.C. § 1983 for failure to state a claim and their state claims after declining to exercise supplemental jurisdiction over them.<sup>104</sup>

### C. THE NINTH CIRCUIT OPINION

On appeal, the Ninth Circuit affirmed the judgment of the district court.<sup>105</sup> Noting that the right of parents to make decisions concerning the care, custody, and control of their children is not without limitations, it focused primarily on whether there existed a right to exclusive control over the introduction and flow of sexual information to their children that was encompassed within some broader constitutional right.<sup>106</sup> The court recognized the constitutionality of certain state actions that seemingly intruded upon the liberty interest of parents in controlling the upbringing and education of their children, and specifically centered on cases pertaining to school programs that educate children in sexuality and health, such as *Brown v. Hot, Sexy & Safer Productions*.<sup>107</sup> In particular, the court adopted the First Circuit’s view that although *Meyer* and *Pierce* allowed parents to choose whether or not to send their children to public school, those cases did not allow parents to direct how a public school teaches their

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100. *Id.* at 1221.

101. *Id.* at 1223 (internal citations omitted) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)).

102. *Id.*

103. *Id.*

104. *Id.* at 1223–24.

105. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1211 (9th Cir. 2005), *amended and reaff’d*, 447 F.3d 1187 (9th Cir. 2006).

106. *Id.* at 1203–07.

107. For a discussion of this case, see *supra* text accompanying notes 70–74.

children; thus, the court held that the parents' asserted right was not encompassed within the *Meyer-Pierce* right.<sup>108</sup>

Finding that the school's survey did not violate any of the parents' due process rights, the court proceeded to review the school's action under a rational basis test.<sup>109</sup> It found a legitimate educational purpose in administering the survey and pointed out that establishing a baseline to measure children's exposure to early trauma fell well within the state's interest in education and protection of children's mental health.<sup>110</sup> The court also noted that the "facilitation of [children's] ability to absorb the education the school provides is without a question a legitimate educational objective."<sup>111</sup> Finally, the school's interest in identifying anxiety, depression, and aggression were within the parameters of the state's authority as *parens patriae*.<sup>112</sup> Accordingly, the court held that the administration of the survey was rationally related to a legitimate state interest, and thus, affirmed the decision of the district court to dismiss the parents' claims.<sup>113</sup>

#### D. WHAT IS WRONG WITH THE *FIELDS* DECISIONS?

Though persuasive in certain ways, both the district court's and the Ninth Circuit's opinions in *Fields* contained analytical flaws. For example, the district court's recharacterization of the plaintiffs' privacy claims as substantive due process claims underscores its misconception of the Fourteenth Amendment. Specifically, though the court recognized that the claims are grounded in the Fourteenth Amendment's Substantive Due Process Clause, it failed to recognize that privacy claims under this Amendment—which are fundamental rights—are substantive due process rights.<sup>114</sup> Thus, there is no need for such a recharacterization. Along the same line, there is a question as to whether the district court overly narrowed the issue by characterizing it as whether parents have a fundamental right to direct the upbringing of their children by controlling their children's exposure to sex in accordance with their personal and

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108. *Fields*, 427 F.3d at 1205–06. The court also held that the parents' asserted right was not encompassed within their constitutional right to privacy with respect to intimate decisions. *Id.* at 1207–08.

109. *Id.* at 1208–11.

110. *Id.* at 1209.

111. *Id.* at 1210.

112. *Id.*

113. *Id.* at 1211.

114. *See, e.g., Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (holding that the right of privacy is part of the liberty protected under the Due Process Clause of the Fourteenth Amendment).

religious values.<sup>115</sup> The level of abstraction at which an alleged right should be defined has always presented a difficult question to the Court because almost any liberty claim may be justified at a high level of abstraction, while almost any may be struck down at a very specific level of abstraction.<sup>116</sup> Arguably, the particular formulation of the parents' rights is overly narrow because it specifically concerns sex and, as such, it is quite plausible that the court's characterization of the right could have fallen under the parents' broader right to control the upbringing of their children, a right which the Court has held to be a liberty interest in the past.<sup>117</sup>

Moreover, the Ninth Circuit's argument that parents' fundamental right to control the education of their children is diminished once they choose to send their children to a public school is based on the dubious assumption that most parents have a realistic choice as to the school their children will attend. In reality, many parents do not have such a choice.<sup>118</sup> Private school tuition can cost anywhere from \$3000 to \$15,000 each year.<sup>119</sup> Home schooling may also not be a feasible alternative as many parents may believe that such a route would fail in helping their children pass standardized tests and develop social skills.<sup>120</sup> Thus, the court's reasoning that parents relinquish some of their constitutional rights when they "choose" to send their children through the door of a public school

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115. *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217, 1220 n.4 (C.D. Cal. 2003), *aff'd*, 427 F.3d 1197 (9th Cir. 2005), *amended and reaff'd*, 447 F.3d 1187 (9th Cir. 2006).

116. CHEMERINSKY, *supra* note 41, at 765 ("[T]here . . . is the question of the abstraction at which [a] right is stated. At a sufficiently general level of abstraction, any liberty can be justified as consistent with the nation's traditions. At a very specific level of abstraction, few nontextual rights would be justified.").

117. *See supra* Part II.B.1. Different justices may prefer different levels of abstraction of a defined right. For example, Justice Scalia has written that he is more likely to accept specifically defined interests, and "refer[s] to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). On the other hand, Justice Douglas defined the right in *Griswold* as one involving the broad right to privacy. *See Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

118. *E.g.*, 151 CONG. REC. H10229, 10312 (daily ed. Nov. 16, 2005) (statement of Rep. Sensenbrenner) ("This [*Fields*] decision presupposes that the school attended by the children is always a matter of parental choice. As we all know, many parents do not have such a choice.").

119. Council for American Private Education, CAPE: Private School Facts, <http://www.cape.net.org/facts.html> (last visited Mar. 13, 2007) (showing that the average private school tuition may range anywhere from close to \$3000 to over \$14,000); Maureen Boland, ParentCenter, How to Get Financial Assistance for Private School Tuition, <http://parentcenter.babycenter.com/refcap/bigkid/gpreschool/64647.html> (last visited Mar. 13, 2007) (noting that though the average tuition for private school is \$3116, the cost may approach \$15,000 for some schools).

120. *See Tara St. John*, Home Schooling: Equitable Educational Experience or Not?, <http://www.mgo.in.com/edu/homeschoolAgainst.html> (last visited Mar. 13, 2007).

does not seem to account for the fact that many parents, in actuality, do not have a choice of where to send their children.<sup>121</sup>

Perhaps the most egregious flaw of the opinions, however, is the failure of both courts to analyze an equally important, if not more important, issue: whether parents have a fundamental right to protect their children from being used as human subjects for potentially harmful social research in public schools. Simply put, the issue the courts should have analyzed is not whether parents may control the flow of sexually explicit information, but whether a school may use children as subjects of social research. This issue is particularly pressing because almost any type of research with young children is extremely risky in light “of the enhanced limitations in cognition and reasoning, experience, social power, and other features that limit their capacity to protect their rights as research participants.”<sup>122</sup> Surveys of such delicate nature that seek personal information, unlike pure educational programs, may put elementary school children who are at vulnerable ages at a higher risk.<sup>123</sup> In this case, exposing elementary school children, especially those in first and third grade, to sexually explicit questions was particularly harmful because many of them did not yet even understand sexual conduct.<sup>124</sup>

Thus, by merely defining the parents’ right as one to direct the upbringing of their children by controlling their exposure to sex, neither court seemed to consider the fact that the survey raised issues about using

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121. In fact, Mr. Sensenbrenner, in support of a House Resolution, argued that parents “should not be forced to forfeit their parental rights when their children enter the schoolhouse gate” precisely because many parents do not have a choice but to send their children to public schools. See 151 CONG. REC. H10229, 10312 (daily ed. Nov. 16, 2005) (statement of Rep. Sensenbrenner).

122. Ross A. Thompson, *Developmental Changes in Research Risk and Benefit: A Changing Calculus of Concerns*, in SOCIAL RESEARCH ON CHILDREN AND ADOLESCENTS: ETHICAL ISSUES, *supra* note 12, at 31, 40. In fact, Thompson points out that “the ethical analysis of research commonly begins with the assumption that children are particularly vulnerable research participants and that studies involving children require special scrutiny to ensure that their rights and needs are protected.” *Id.*

123. For example, psychologists have noted that psychological evaluations must be crafted carefully because survey questions themselves may potentially pose problems to children. *E.g.*, 151 CONG. REC. H10229, 10314 (daily ed. Nov. 16, 2005) (statement of Rep. Murphy, a child psychologist). A psychologist who specializes in children and families explained that when he conducts psychological evaluations of children who may have been sexually abused, he must use extra caution. *Id.* He also explained: “[T]he law enforcement people are very careful what questions they ask the child because they are concerned whether the questions themselves cause problems for the children. And when that happens, one has to back off and not ask those questions anymore.” *Id.* See also Maeshiro, *supra* note 1 (quoting a parent who feared that sex questions may be “putting poison into kids’ minds”).

124. See ARNOLD GESELL, FRANCES L. ILG & LOUISE BATES AMES, *THE CHILD FROM FIVE TO TEN* 108, 176 (revised ed. 1977) (discussing the sex-related maturity traits of six- and eight-year-olds).

children as research subjects.<sup>125</sup> Similarly, neither court acknowledged the rights of the children, many of whom were too young to recognize that they were being used as subjects of human research.<sup>126</sup> Consequently, the opinions simply failed to adequately clarify the real issues: whether parents have a fundamental right to protect their children from being used as human subjects in social science research in public schools, and whether the school infringed upon this right in administering the survey. The balance of this Part of the Note addresses these concerns.

E. REFRAMING THE *FIELDS* DECISIONS: AN ALTERNATIVE ANALYSIS  
UNDER THE FOURTEENTH AMENDMENT

1. Do Parents Have a Fundamental Right in Protecting Their Children?

Parents should have a fundamental right<sup>127</sup> in protecting their children from potentially harmful social research, including research arising in public schools. Although the Constitution does not explicitly establish such a right, the desire to protect vulnerable children who are not able to protect themselves has always been a tradition in the American system. That is, the modern day Supreme Court has consistently affirmed the idea that the parents' interest in the care of their children is a fundamental liberty interest,<sup>128</sup> while American history and culture reflect an enduring tradition

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125. In *C.N. v. Ridgewood Board of Education*, the court recognized that presenting a social survey in a public school raised issues about social research and not solely about education. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005). For a discussion on *Ridgewood*, see Part IV.B.2, *infra*.

126. As stated *supra* note 64, another concurrently important issue is whether the administration of the surveys is a violation of the children's constitutional rights, which is beyond the scope of this Note. A discussion of this issue would require an analysis of cases that have examined children's constitutional interests.

127. Today, there is a question as to whether a right is a "fundamental right" or a "fundamental liberty interest"—the Supreme Court seems to now make an implicit distinction between the two. *Carpenter*, *supra* note 31, at 1140. This Note will analyze the parents' potential rights as "fundamental rights" that would draw strict scrutiny, though it is possible that the Court could define the rights as "fundamental liberty interests" that would draw a lessened standard of review. As an example of this ongoing debate, in *Troxel v. Granville*, Justice O'Connor spoke of the "fundamental rights and liberty interests" at issue in the case but would apply only "heightened protection." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Justice Thomas, however, wrote that strict scrutiny should apply. *Id.* at 80 (Thomas, J., concurring).

128. *Troxel*, 530 U.S. at 65 (holding that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court," though not explicitly referring to strict scrutiny); *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (noting that a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right" (internal quotations omitted)).

of parental concern for the nurturing of children.<sup>129</sup> Moreover, though parents may be forced to relinquish control over curriculum and other education-related decisions at a particular school,<sup>130</sup> it makes little sense to assume that they give up the same rights over noneducational decisions, including the use of their children in social research, just by sending their children through the schoolhouse gates. In this respect, the courts in *Fields* should have found a fundamental right of parents to protect their children from harm, including harm arising from invasive and threatening questions used for social research in public schools.

## 2. Did the School Infringe upon the Parents' Fundamental Rights?

After finding that parents have a fundamental right in protecting their children from potentially harmful research, it is likely that the school infringed upon this interest by failing to obtain the informed consent of the children's parents. Given the delicate and potentially harmful nature of the questions, the school district should have acknowledged the risks the survey would present and should have explicitly communicated them to parents. Without having knowledge that such sexually explicit questions would be asked, the parents had little reason to believe that their children would be exposed to questions that could present potential harm. To that extent, sending a letter home simply warning that some questions may potentially make some students "uncomfortable" was not sufficient to constitute genuine informed consent. As a result, the school's administration of the survey was likely a direct and substantial infringement of the parents' fundamental right in protecting their children.<sup>131</sup>

## 3. Does the School Have a Compelling Interest?

To justify its infringement on parents' fundamental rights, the school must have a compelling state interest to withstand strict scrutiny.<sup>132</sup> In this

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129. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

130. *See supra* notes 70–74 and accompanying text.

131. The recognition of these specific parental rights does not constitute directing or controlling curriculum at a school. Moreover, because the contents of the survey may harm children, a similar form of harm could arguably subsequently arise if the school decided to use the results in an educational context. Thus, an argument may be made that the later use of the survey results would also infringe upon the parent's rights. This argument, however, could potentially fail because it is directed at a school's choice of educational methods and curriculum, and the Court has held that parents do not have a right to direct or control the curriculum at a public school. *See supra* notes 70–74.

132. Although *Meyer* and *Pierce* did not explicitly examine whether the state has a "compelling state interest" to justify its infringement on parental interests, the Court's actual analysis was operationally and functionally similar to such an examination. In *Meyer*, the Court explained: "That the

scenario, the school would likely argue that caring for the mental health of its students by establishing a community baseline measure of children's exposure to early trauma is a compelling interest. Though this type of interest may not be as "compelling" as an interest in, for example, winning a war and preventing harm to a nation,<sup>133</sup> it is similar to an interest in caring for the welfare of children, an interest that the Supreme Court has suggested to be important under the doctrine of *parens patriae* in the past.<sup>134</sup> Furthermore, schools may also have a compelling interest in attempting to protect children by questioning them on these matters because parents may not be aware of their children's problems or risky behavior.<sup>135</sup> Thus, the school's proffered reason of protecting and caring for the mental health of children by identifying behaviors such as anxiety, depression, and aggression, may justify the school's action as a compelling interest.

Perhaps more importantly, however, the school has a compelling interest in providing an effective educational program to its students, which courts have held time after time to be a compelling interest.<sup>136</sup> The school alleged that the ultimate goal of its survey was to improve students' ability to learn by gauging exposure to early trauma and to assist the school in reducing barriers to students' ability to learn;<sup>137</sup> thus, if the survey does in fact facilitate the children's absorption of educational materials, then the state would have not only a potentially compelling interest in protecting the mental welfare of children, but also one falling within the state's broad interest in education.

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State may do much . . . in order to improve the quality of its citizens . . . is clear." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Similarly, the Court in *Pierce* explained that "[n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). It was not until *Yoder* that the Court explicitly referred to a "compelling state interest" when it balanced the state's "compelling" interest in its system of compulsory education against parental interests. *See Yoder*, 406 U.S. at 221–29.

133. *See Korematsu v. United States*, 323 U.S. 214, 223 (1944).

134. *Cf. Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that the state, as *parens patriae*, may enforce certain of its interests in a child's wellbeing against the wishes of parents).

135. *See Stanley & Sieber*, *supra* note 12, at 2 ("Much of the high-risk behavior of adolescents occurs without parental knowledge.").

136. *E.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."); *Curtis v. Sch. Comm.*, 652 N.E.2d 580, 584 (Mass. 1995) ("Public education of children is unquestionably entrusted to the control, management, and discretion of State and local school committees.").

137. *See supra* text accompanying notes 110–12.

4. Does the School Have Less Restrictive, Alternative Means to Accomplish Its Goals?

Finally, to survive strict scrutiny, the school must establish that its actions were narrowly drawn, or that there is no less restrictive and equally effective alternative to accomplish its stated purpose. As stated previously, in *Fields*, the school district's proffered purpose of its actions was to establish a baseline for early childhood trauma and to help children learn. The district aimed to accomplish this goal through the creation of a social survey to be implemented without first securing parents' informed consent.

Though there are potentially several less restrictive means for a school to identify early trauma in children and to enhance education, these alternatives may not be as effective. For example, one potentially less restrictive means for a school to protect the mental health of its students is for it to administer the survey to only those students who it has identified as possessing behavioral problems. Thus, the researcher would target the survey not to the entire school population, but only to those students who physically present problems that need to be addressed. Though this method is arguably less restrictive because those students who have no problems would not be affected, it is not likely to be equally effective because it would be extremely difficult for the school to identify those students who have internal behavioral problems, such as depression and anxiety, but do not physically display any symptoms. Moreover, administering the survey to selected students would not identify those students who do not yet have, but may in the future develop, behavioral problems. In this way, selectively administering the survey is not as effective as a survey given to an entire class population if the school's interest is to establish a community baseline for early trauma and to protect the mental health of its students.

Another potentially less restrictive alternative is to administer the survey only after securing the informed consent of the parents. This alternative, once again, is probably not equally effective because many parents would likely not grant their consent to the school after they learn about the delicate nature of the survey, thereby impairing the quality of the study because of the reduced number of student subjects. Even if a sufficient number of parents do grant consent, a problem exists if children fear that parents will ask them the same questions the survey poses because children might then fear telling the truth on the survey and to their parents, despite assurances of confidentiality. This interaction between the child and the parent would lessen the reliability of the survey results and

consequently would hinder the school's ability to establish a community baseline for early trauma.

In sum, although the *Fields* decisions were arguably misguided in their constitutional analyses in failing to recognize a parental right in protecting children from potentially harmful social research, the opinions were likely correct in finding that there was no violation of the parents' rights under the Fourteenth Amendment as the school's actions could probably survive strict scrutiny.<sup>138</sup> This means that, unfortunately, schools are theoretically free under the Fourteenth Amendment to administer social research surveys to public school students without first obtaining the informed parental consent. This poses not only potential problems for the children's wellbeing, but also presents troubling policy issues. Despite these concerns, parents will likely face difficulty in fighting for their rights under the Fourteenth Amendment, which suggests that in order to have any chance at all of protecting their children, they must turn to alternative forms of law.

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138. Overall, because the school probably did not have an equally effective but less restrictive means for carrying out its compelling interests, the court will likely find that strict scrutiny is satisfied, though opponents of the survey may argue that it is not satisfied for other reasons. For example, they may argue that often times, courts evaluate a state's interest against the right claimed and the degree of harm attending its infringement, and thus, may strike down government action that infringes on a strong fundamental interest even if the alternatives are less effective. *Cf. Dean Milk Co. v. Madison*, 340 U.S. 349, 354–56 (1951) (holding that a law that required milk to be pasteurized within five miles of the city was unconstitutional because the city could achieve its goal of selling safe milk by relying on inspections). In this way, opponents may argue that an alternative, such as securing informed consent, should be required even though it may result in a less effective study.

Similarly, actions that do not actually further a compelling interest may not survive strict scrutiny analysis. *See Griswold v. Connecticut*, 381 U.S. 479, 506–07 (1965) (White, J., concurring) (explaining that a ban on contraceptives by married couples does not further the state's goal of banning illicit sexual relationships). Thus, opponents may argue that the methodology of the survey is poorly designed and, therefore, does not further the state's compelling interest, pointing to the fact that there may be little correlation between administering a survey that asks questions related to sex and establishing an effective educational system by removing learning barriers.

Even if parents correctly and legitimately raise these points, however, they may nonetheless face difficulty in having their arguments heard because certain courts, especially conservative ones, may not be willing to consider and expand unenumerated parental rights in this particular context. In fact, courts have generally shown very little interest in expanding fundamental rights during the past two decades. *See Ross, supra* note 42, at 182 (“[C]ourts during the past twenty years have exhibited little willingness to expand the parameters of substantive due process.”). Thus, parents will likely have great difficulty in finding relief under the Fourteenth Amendment.

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#### IV. SOCIAL RESEARCH IN PUBLIC SCHOOLS: POTENTIAL LEGISLATIVE AND ADMINISTRATIVE SOLUTIONS?

As discussed in Part III of this Note, it is unlikely that parents will find judicial relief under the Fourteenth Amendment if a school decides to administer a social survey. Thus, they will likely need to turn to other sources of potential relief, such as statutes or regulations. This Part of the Note examines each of these potential solutions in turn. It will first, however, give a brief history and background on social research in public schools.

##### A. THE DEVELOPMENT OF SOCIAL RESEARCH IN PUBLIC SCHOOLS: A BRIEF BACKGROUND

Researchers and psychologists have realized the endless possibilities of conducting research on children in public schools for over half a century. Specifically, beginning in the 1950s, they acknowledged the potential of using the school system to examine social issues surrounding the nation's youth.<sup>139</sup> At the time, the use of the school setting as a "laboratory" for research seemed logical—researchers could not only analyze students in a natural setting of a school,<sup>140</sup> but also observe students over a long period of time, an advantage that would not be possible in the classic laboratory.<sup>141</sup> Thus, ever since the middle of the twentieth century, psychologists have encouraged the use of schools as a setting for conducting research.<sup>142</sup>

At the same time, however, psychologists have also recognized its drawbacks and difficulties. During the 1950s, they acknowledged that research in a school requires preparation and cooperation, not only from the researcher and student, but also from the school and its "hostile" teachers and administrators.<sup>143</sup> After realizing that researchers become "intruders"

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139. See Anne M. Dellinger, *Experimentation in the Classroom: Use of Public School Students as Research Subjects*, 12 J.L. & EDUC. 347, 349 (1983) ("Psychologists on the staff of public schools were urged to take advantage of their unique opportunities to observe children for purposes of social science research.").

140. *Id.*

141. Marcia Guttentag, *Research Is Possible: New Answers to Old Objections*, 6 J. SCH. PSYCHOL. 254, 258 (1968) (noting the advantage of observing subjects for long periods in a "natural field situation," such as a school).

142. Dellinger, *supra* note 139, at 349.

143. Frances A. Mullen, *The School as a Psychological Laboratory*, 14 AM. PSYCHOLOGIST 53, 55 (1959) (noting that "[p]sychology must sell its wares to skeptical if not openly hostile teachers and administrators"). *But see* Dellinger, *supra* note 139, at 349 (noting that researchers were surprised that school officials were cooperative in research).

as soon as they step foot into a school,<sup>144</sup> psychologists attempted to establish mutually beneficial relationships that would give schools incentives to allow the researchers access to students.<sup>145</sup> For example, in determining whether to grant researchers access to its students, a school would examine factors such as the nature of the research and the value of the study to the district and to knowledge in general.<sup>146</sup> In other words, schools were more likely to grant access to researchers when the research was likely to directly benefit the school.<sup>147</sup>

Moreover, researchers did not face potential setbacks solely with administrators or teachers. Just as important as convincing a school that a research project was worth undertaking was dealing with parents who objected to their children being used as “guinea pigs” for experimentation.<sup>148</sup> Although most suburban schools during the 1950s and 1960s required parental permission for a child to participate in research, issues of invasion of privacy and the appropriateness of test materials nonetheless often formed the subject of debate for school boards.<sup>149</sup> For example, after heeding the complaints of parents regarding a survey that inquired about students’ perceptions of themselves and about their relationships with others, a Houston school board in 1959 ordered the burning of the test materials given to 5000 ninth graders.<sup>150</sup> Similarly, two years later, researchers studying aggressiveness in third graders faced opposition from parents, the community, and the media, all of whom claimed that the study was exceedingly controversial.<sup>151</sup>

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144. See June Sciarra, *The Researcher Goes to School*, 6 J. SCH. PSYCHOL. 249, 251 (1968). Sciarra analyzes the relationship a researcher shares with an administrator and a teacher. She realizes that once psychiatrists enter a school, they enter the domain of the administrator, from whom they ask special favors. *Id.* She also acknowledges that when psychiatrists enter a classroom, they enter the domain of the teacher, whose primary obligation is to teach children, not conduct research on them. *Id.* at 252. Nonetheless, although “[e]ducational research in the naturalistic setting is not easy . . . it can work when mature professionals decide together to make it work.” *Id.* at 253.

145. See Robert E. Clasen, Donald M. Miller & Robert F. Conry, *Access to Do Research in Public Schools*, 38 J. EXPERIMENTAL EDUC. 16–29 (1969). Clasen’s article describes the results of a study that, among other things, examined factors that schools considered in determining whether to grant researchers access to their students.

146. *Id.* at 20.

147. See Alfred Castaneda & Leila S. Fabel, *The Relationship Between the Psychological Investigator and the Public Schools*, 16 AM. PSYCHOLOGIST 201, 201 (1961) (noting that though schools can be receptive to research on a wide range of areas, they are more receptive to research in areas that are important to them).

148. Guttentag, *supra* note 141, at 254.

149. *Id.*

150. Dellinger, *supra* note 139, at 350.

151. *Id.* Despite the opposition, the study concluded as planned. *Id.*

Nonetheless, many American schools, both historically and today, seem to welcome researchers,<sup>152</sup> though there still remain concerns regarding the rights of children, particularly those surrounding the right of a child to give consent to be used as a research subject. Generally, obtaining the informed consent of children is problematic because children may not be able to understand the purposes, risks, and benefits of a particular research undertaking, and thus may not be able to consent voluntarily.<sup>153</sup> As a result, in much social research today, a parent is responsible for deciding whether or not his or her child should be allowed to participate in the research if the child is under eighteen years of age.<sup>154</sup> This is problematic, however, because it denies children “the right to make their own decisions about involvement.”<sup>155</sup> Consequently, social researchers must be careful to ensure that both the children’s and parents’ rights are protected.<sup>156</sup>

All of these concerns ultimately spawned a reaction in the 1960s from Congress, which after some time, became receptive to the idea of regulating social research with children.<sup>157</sup> Today, several statutes and regulations govern the administration of research and surveys in public schools, though whether these laws afford adequate protection to parents and children is an open question.

## B. FEDERAL LAWS: STATUTES AND REGULATIONS

### 1. Federal Statutes: FERPA and PPRA

In response to the growing trend of schools conducting social research on their students, individual communities as well as the federal legislature initiated proposals to regulate the administration of research in public schools.<sup>158</sup> Initially Congress repeatedly turned down these proposals, however. In 1962, Ohio Representative John Ashbrook introduced a bill

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152. *See id.* at 349.

153. *See* Ruth Macklin, *Autonomy, Beneficence, and Child Development: An Ethical Analysis*, in *SOCIAL RESEARCH ON CHILDREN AND ADOLESCENTS: ETHICAL ISSUES*, *supra* note 12, at 88, 90. Many times, mere “assent” instead of full “informed consent” is obtained from a child. For a discussion of “assent” compared to “consent,” see Alexander J. Tymchuk, *Assent Processes*, in *SOCIAL RESEARCH ON CHILDREN AND ADOLESCENTS: ETHICAL ISSUES*, *supra* note 12, at 128, 128–38.

154. Alan France, *Young People*, in *DOING RESEARCH WITH CHILDREN AND YOUNG PEOPLE*, *supra* note 21, at 175, 179.

155. *Id.* at 179–80.

156. Though obtaining a child’s assent or consent is important, a detailed inquiry into this topic is beyond the scope of this Note.

157. Dellinger, *supra* note 139, at 350–51.

158. *See id.*

that would have required schools to inform parents that their children were being used as subjects for research in the classroom.<sup>159</sup> Congress did not pass the bill.<sup>160</sup> Four years later, Congress again refused to pass another bill, this time introduced by New York Representative Benjamin Rosenthal.<sup>161</sup> His bill, which focused on federally funded research, would have required public schools to obtain parental consent before administering certain tests on their students.<sup>162</sup>

Eight years later, Congress again refused to enact a provision of another bill, this time introduced by Senator James Buckley, which would have required schools to procure parental consent before administering certain research tests on their students that sought personal information.<sup>163</sup> Congress did, however, enact other sections of the bill pertaining to access to students' records.<sup>164</sup> These provisions, which eventually became the Family Educational Rights and Privacy Act ("FERPA"), now require schools to make available certain educational materials of the students to parents for inspection.<sup>165</sup> FERPA was enacted pursuant to Congress's spending power, however, and thus applies only to those schools that receive federal funding.<sup>166</sup>

It was not until 1984 that Congress decided to enact its first law specifically governing the administration of public school surveys. Orrin Hatch, a senator from Utah, proposed an amendment that gave parents notification rights when a school required their children to participate in certain federally funded research programs in which the children would

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159. Garrison, *supra* note 17, at 164.

160. *Id.*

161. H.R. 14288, 89th Cong. (1966). *See also* Dellinger, *supra* note 139, at 350–51; Garrison, *supra* note 17, at 164.

162. Dellinger, *supra* note 139, at 350–51; Garrison, *supra* note 17, at 164. Though the Rosenthal bill ultimately failed, it was enough to spur the interest of Congress. *See* Dellinger, *supra* note 139, at 351–52.

163. Garrison, *supra* note 17, at 166–67 & n.117.

164. Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-568, 88 Stat. 1858 (1974) (codified as amended at 20 U.S.C. § 1232g (2000)). *See also* Garrison, *supra* note 17, at 166–67 & n.118.

165. 20 U.S.C. § 1232g. The statute states:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

20 U.S.C. § 1232g(a)(1)(A).

FERPA's regulatory counterpart may be found at 34 C.F.R. pt. 99 (2006).

166. *See* 20 U.S.C. § 1232g(a). *See also* U.S. Dep't of Educ., FERPA General Guidance for Parents, <http://www.ed.gov/policy/gen/guid/fpco/ferpa/parents.html> (last visited Mar. 13, 2007). The Department of Education's site notes that "[p]arochial and private schools at the elementary school levels do not generally receive such funding and, therefore, are not subject to FERPA." *Id.*

disclose personal information.<sup>167</sup> Generally known as the Protection of Pupil Rights Amendment (“PPRA”), Hatch’s amendment contained two provisions.<sup>168</sup> First, similar to FERPA, it made instructional materials available for parental inspection, including any material used in connection with any survey or evaluation.<sup>169</sup> Second, it required parental (or sometimes student) consent before the administration of surveys that sought certain personal information, such as information about mental or psychological problems or sexual behavior.<sup>170</sup> Both provisions apply when the school receives federal funding in connection with the administration of the research.<sup>171</sup> After several years of deliberation and hearings, the Department of Education implemented Hatch’s amendment, along with its corresponding administrative regulations, in 1984.<sup>172</sup>

Over the next couple of decades, further amendments were made to PPRA. Several years after its original enactment, Senator Charles Grassley criticized the law for placing an overly heavy burden on parents to allege and establish a violation in school.<sup>173</sup> An amendment was thereby passed that, among other things, created a review board to investigate potential PPRA violations.<sup>174</sup> A few years later, Congress passed another amendment. Designed to give parents more control in their children’s education, this amendment now requires local educational agencies to adopt policies concerning parental rights and to notify parents of those rights.<sup>175</sup>

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167. See Garrison, *supra* note 17, at 167–68.

168. *Id.* at 168. See also 20 U.S.C. § 1232h (2000).

169. The statute specifically states that “All instructional materials, including . . . supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by parents or guardians of the children.” 20 U.S.C. § 1232h(a).

170. Specifically, the statute today prevents a school from requiring a student to submit to a survey, without prior written consent, that seeks information concerning “political affiliations or beliefs of the student”; “mental or psychological problems of the student”; “sex behavior or attitudes”; “illegal, anti-social, self-incriminating, or demeaning behavior”; “critical appraisals of other individuals”; “legally recognized privileged or analogous relationships”; “religious practices, affiliations, or beliefs of the student”; and “income.” *Id.* § 1232h(b).

171. *Id.* §§ 1232h(a)–(b) (noting that these subsections apply to surveys or evaluations conducted as a part of any “applicable program”); U.S. Dep’t of Educ., Protection of Pupil Rights Amendment (PPRA), <http://www.ed.gov/policy/gen/guid/fpco/ppra/index.html> (last visited Mar. 13, 2007) (noting that PPRA applies to programs that receive funding from the U.S. Department of Education).

172. See Garrison, *supra* note 17, at 168–70. PPRA’s corresponding regulations are codified at 34 C.F.R. pt. 98 (2006).

173. Garrison, *supra* note 17, at 173.

174. Act of Mar. 31, 1994, Pub. L. No. 103-227, 108 Stat. 268 (1994) (codified as amended at 20 U.S.C. § 1232h(f)); Garrison, *supra* note 17, at 175–76.

175. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 2083–88 (2001) (codified at 20 U.S.C. § 1232h(c)) (requiring the establishment of local policies concerning student

## 2. Judicial Interpretations of FERPA and PPRA

Though the legislative history of FERPA and PPRA has been rather extensive, it was not until recently that courts began to devote more of their attention to these two statutes. Within the past several years, several court decisions have severely limited the applicability of these two laws and thereby the ability of parents to obtain relief.<sup>176</sup> Thus, although both statutes may appear beneficial to parents and students as they theoretically prevent a school's administration of intrusive surveys, both statutes have proven to be ineffective for a couple of reasons.

First, and perhaps most importantly, FERPA's enforceability is limited because it does not give parents a private right of action. In *Gonzaga University v. Doe*, the Supreme Court held that only the secretary of the Department of Education, and not private citizens, may enforce FERPA.<sup>177</sup> That case involved a student pursuing an education degree who sued a university and one of its employees for sharing confidential information from his education records without obtaining his consent.<sup>178</sup> Specifically, the student filed a claim under 42 U.S.C. § 1983, which provides relief for a violation of a constitutional or statutory right.<sup>179</sup>

In his opinion, Justice Rehnquist noted that to seek redress under § 1983, the cause of action must arise from a violation of rights either afforded by the U.S. Constitution or explicitly conferred by Congress.<sup>180</sup> He stated, "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."<sup>181</sup> Perhaps most importantly, he explained that the statute

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privacy and parental notification procedures); Garrison, *supra* note 17, at 176–81. *See also* HB-Rights.org, *supra* note 23 (discussing the contents of the PPRA).

176. *See, e.g.*, U.S. Dep't of Educ., Recent Changes Affecting FERPA and PPRA, <http://www.ed.gov/policy/gen/guid/fpcu/hottopics/ht10-28-02.html> (last visited Mar. 13, 2007) (listing some recent judicial opinions that have affected FERPA and PPRA).

177. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287–89 (2002). Although the secretary of education is the sole person who may enforce the statute, the secretary was authorized by Congress to create the Family Policy Compliance Office ("FPCO"), whose role is to investigate potential FERPA and PPRA violations. *See* U.S. Dep't of Educ., About the Family Compliance Office, <http://www.ed.gov/policy/gen/guid/fpcu/index.html> (last visited Mar. 13, 2007). Parents who believe that a school has violated either of these statutes may file a complaint with the FPCO, which will investigate the allegations. *Id.* The FPCO may not have the resources necessary to investigate all potential violations of FERPA and PPRA, however. *See* Garrison, *supra* note 17, at 205 (arguing that "the FPCO does not have the manpower to properly evaluate all of the Nation's public schools").

178. *Gonzaga*, 536 U.S. at 277.

179. *Id.* at 277, 279. *See also* 42 U.S.C. § 1983 (2000).

180. *Gonzaga*, 536 U.S. at 279–80.

181. *Id.* at 283.

did not show any congressional intent to create new rights, and emphasized that the rights afforded under FERPA belonged solely to the secretary of education.<sup>182</sup> Thus, as a result of *Gonzaga*, parents are not granted a private right of action under FERPA.<sup>183</sup>

Second, PPRA's applicability is limited because it does not apply to surveys that students volunteer for or were requested to take. Specifically, because the statute prevents schools only from *requiring* students to take a social research survey without first obtaining parental consent, a school is theoretically free to *request* that students submit to a survey without obtaining such consent, so long as submitting to the survey is not required. *C.N. v. Ridgewood Board of Education*<sup>184</sup> illustrates this point. In that case, a "Human Resources Coordinating Council," along with a school, administered a survey to middle school and high school students intended to gauge the needs and attitudes of the community's children.<sup>185</sup> After the district's superintendent notified all parents of the survey's goals and communicated that it was voluntary and anonymous, the school administered the survey.<sup>186</sup> The survey asked the students whether they had ever stolen from a store, used drugs, or physically harmed someone.<sup>187</sup> After learning about these questions, parents filed a suit, specifically alleging a violation of their rights under FERPA and PPRA and the First Amendment of the Constitution, among others.<sup>188</sup>

The district court immediately dismissed the FERPA and PPRA claims after the parents failed to show that the school survey was not part of any "applicable program" because it was not federally funded.<sup>189</sup> More importantly, however, the court noted that because the parents failed to

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182. *See id.* at 284–87. Justice Rehnquist explained that when a statute, like FERPA, does not include "right- or duty-creating language," the Court will "rarely" impute a private right of action. *Id.* at 284 n.3.

183. Although the Supreme Court has not ruled on the issue, arguably PPRA affords no private right of action due to its linguistic similarity to FERPA. *See Garrison, supra* note 17, at 193–94.

184. *C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J. 2001), *aff'd in part and rev'd in part*, 281 F.3d 219 (3d Cir. 2001), *remanded*, 319 F. Supp. 2d 483 (D.N.J. 2004), *aff'd*, 430 F.3d 159 (3d Cir. 2005).

185. *Ridgewood*, 430 F.3d at 162.

186. *See id.* at 164–65.

187. *Id.* at 168–69.

188. *Id.* at 170–71. The plaintiffs also claimed that the survey violated their (1) "right under the Fourth and Fourteenth Amendments to be free from unlawful intrusion into the household"; (2) "right under the Fourth and Fourteenth Amendments to raise their children as they see fit"; and (3) children's "right under the Fifth Amendment not to be forced to incriminate themselves." *Id.* Each of these claims, however, were defeated. *See id.* at 190 (declaring summary judgment in favor of the defendants).

189. *Ridgewood*, 146 F. Supp. 2d at 536–37 (internal quotations omitted) (quoting 20 U.S.C. § 1232h(b) (2000)).

show that the students were *required* to submit to the survey, PPRA did not apply.<sup>190</sup> Similarly, the court dismissed the parent's First Amendment claims because the students were never required or compelled to take the survey.<sup>191</sup> On appeal, the Third Circuit reversed and remanded the case because there was a genuine issue of material fact as to whether the survey was indeed voluntary.<sup>192</sup> On remand, however, the parents dropped their FERPA and PPRA claims, presumably in light of the holding in *Gonzaga* that FERPA does not entitle them a private right of action.<sup>193</sup> Thus, the court never had the opportunity to reconsider the PPRA claims, but resolving the issue of whether the parents' rights were violated under this statute would have arguably depended on the survey's voluntariness.

As a practical matter, *Ridgewood* highlights the limited applicability of PPRA. Simply stated, it suggests that schools may easily evade the provisions of the statute by claiming that taking a particular survey is merely voluntary and that students may decline to take it if they so choose. This is problematic because the assumption that students do in fact feel free to decline to take voluntary surveys is inaccurate; many times, students may not believe they have this option. For example, researchers may not make explicitly clear to students or parents that the survey is indeed voluntary, regardless of the school's intentions. In *Ridgewood*, despite the school's best effort to inform parents that the survey was voluntary, teachers nonetheless created the impression that students were required to take it.<sup>194</sup>

Moreover, even if schools are successful in communicating that a survey is not mandatory, they nonetheless may create the impression that they will look down on students who decline to participate in the survey, or may even make it somewhat difficult for students or parents to opt out. For example, in *Ridgewood*, the school did not distribute consent forms and did

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190. *Id.* at 537 (noting that “[n]either has it been established that the students were ‘required’ to answer the survey questions” and that “[t]o the contrary, the evidence demonstrates that the survey was completely voluntary”).

191. *Id.* at 538.

192. *C.N. v. Ridgewood Bd. of Educ.*, 281 F.3d 219 (3d Cir. 2001). *See also Ridgewood*, 430 F.3d at 172 (noting that a genuine issue of material fact existed as to whether the survey was indeed voluntary).

193. *See Ridgewood*, 430 F.3d at 170–71 & n.13. The parents presumably interpreted *Gonzaga* as applicable to not only FERPA but also PPRA.

194. *Id.* at 175. In *Ridgewood*, the plaintiffs claimed that although the administrator instructed the students that the survey was voluntary, the teacher told them that they “have to take [the survey].” *Id.* (alteration in original) (internal quotations omitted). Further, students who were absent the day of the survey were required to “make it up.” *Id.* (internal quotations omitted).

not instruct parents on how to opt their children out if they so chose.<sup>195</sup> Even worse, these problems are accentuated in an elementary school environment, where young children have not yet attained the mental capacity to understand the true nature of a “voluntary” survey<sup>196</sup> and thereby do not understand their freedom to withdraw.<sup>197</sup> Thus, the mere fact that a school claims that a survey is voluntary has very little bearing on whether the survey is truly voluntary. As a result, PPRA, like FERPA, fails to provide parents with any real relief as it stands today.

### 3. Existing Federal Regulations on Human Subjects of Research

In April 1979, the Department of Health, Education, and Welfare issued the Belmont Report, which set forth ethical principles and guidelines for the protection of human subjects of research.<sup>198</sup> This report focused on three primary considerations. First, it attempted to distinguish between biomedical and behavioral research on the one hand and the practice of accepted therapy on the other, though it noted that the two are often blurred.<sup>199</sup> Second, it identified basic ethical principles of research, such as respecting the wellbeing of persons and adhering to concepts of justice.<sup>200</sup> Third, it suggested certain prerequisites for the conduct of research, such as informed consent, a risk-versus-benefit analysis, and an equitable selection of subjects, all of which were based on the ethical principles governing research.<sup>201</sup>

Noting the importance of protecting human research subjects, seventeen federal departments and agencies in 1991 agreed to promulgate a

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195. *Id.*

196. See Judith Masson, *The Legal Context*, in *DOING RESEARCH WITH CHILDREN AND YOUNG PEOPLE*, *supra* note 21, at 43, 50–51 (explaining that because a researcher is in a powerful position, special care needs to be taken to ensure that children do not feel obligated to consent to research in fear of being penalized).

197. Thompson, *supra* note 122, at 38–39 (noting that children have difficulty understanding the research process because “[t]heir capacity to make reasoned decisions concerning research participation, to understand the informed consent procedure and their freedom to withdraw . . . is limited”).

198. NAT’L COMM’N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL & BEHAVIORAL RESEARCH, U.S. DEP’T OF HEALTH, EDUC., & WELFARE, PUB. NO. 78-0012, *THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH* (1979), available at <http://www.hhs.gov/ohrp/humansubjects/guidance/belmont.htm>.

199. *Id.* (noting that it is important to provide a distinction between research and therapy in order to “know what activities ought to undergo review for the protection of human subjects of research,” though also noting that the terms “experimental” and “research” are not carefully defined).

200. *Id.* Specifically, the report identified three basic ethical principles: (1) respect for persons, (2) beneficence, and (3) justice.

201. *Id.*

common set of rules derived from principles set forth in the Belmont Report,<sup>202</sup> which are now reflected in numerous parts of the Code of Federal Regulations.<sup>203</sup> One of the most significant departments is the U.S. Department of Health and Human Services (“DHHS”), the principal agency for regulating health services and for protecting individuals used as research subjects.<sup>204</sup> Indeed, one of the primary goals of the DHHS is to oversee health and social science research.<sup>205</sup> Another department that has adopted the rules is the U.S. Department of Education (“DoE”), whose role is not only to ensure equal access to education and to promote educational excellence,<sup>206</sup> but also to oversee the quality and usefulness of federally funded studies.<sup>207</sup>

In these overall policies,<sup>208</sup> the federal departments and agencies first establish institutional review boards (“IRBs”)<sup>209</sup> that monitor and have the authority to approve or disapprove all proposals for research supported or conducted by a federal department or agency.<sup>210</sup> The federal departments and agencies then set forth the following seven criteria for an IRB’s approval of a research project: (1) the risks to subjects are minimized; (2) the risks to subjects are reasonable in relation to the anticipated benefits; (3) the selection of subjects is equitable, taking into account the

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202. U.S. Dep’t of Educ., Information About the Protection of Human Subjects in Research Supported by the Department of Education—Overview, <http://www.ed.gov/policy/fund/guid/humansub/overview.html> (last visited Mar. 13, 2007).

203. See Federal Policy for the Protection of Human Subjects, 56 Fed. Reg. 28,003 (June 18, 1991). Some of the federal departments and agencies that have adopted and codified the common set of regulations are: The Department of Agriculture, 7 C.F.R. pt. 1c (2006); The Department of Energy, 10 C.F.R. pt. 745 (2006); The National Aeronautics and Space Administration, 14 C.F.R. pt. 1230 (2006); The Department of Commerce, 15 C.F.R. pt. 27 (2006); The Consumer Product Safety Commission, 16 C.F.R. pt. 1028 (2006); The Agency for International Development, 22 C.F.R. pt. 225 (2006); The Department of Housing and Urban Development, 24 C.F.R. pt. 60 (2006); The Department of Justice, 28 C.F.R. pt. 46 (2006); The Department of Defense, 32 C.F.R. pt. 219 (2006); The Department of Veterans Affairs, 38 C.F.R. pt. 16 (2006); The Environmental Protection Agency, 40 C.F.R. pt. 26 (2006); The Department of Health and Human Services, 45 C.F.R. pt. 46 (2006); The National Science Foundation, 45 C.F.R. pt. 690 (2006); The Department of Education, 34 C.F.R. pt. 97 (2006); and The Department of Transportation, 49 C.F.R. pt. 11 (2006).

204. See U.S. Dep’t of Health & Human Servs., HHS: What We Do, <http://www.hhs.gov/about/whatwedo.html/> (last visited Mar. 13, 2007).

205. See *id.*

206. U.S. Dep’t of Educ., Overview, <http://www.ed.gov/about/landing.jhtml?src=gu> (last visited Mar. 13, 2007).

207. U.S. Dep’t of Educ., Mission, <http://www.ed.gov/about/overview/mission/mission.html> (last visited Mar. 13, 2007).

208. Although this Note focuses primarily on the regulations promulgated by the DHHS and DoE, it is important to note the existence of similar regulations promulgated by other agencies. See *supra* note 203 and accompanying text.

209. See, e.g., 34 C.F.R. §§ 97.107–09 (2006); 45 C.F.R. §§ 46.107–09 (2006).

210. See, e.g., 34 C.F.R. § 97.109; 45 C.F.R. § 46.109.

vulnerability of the subjects; (4) informed consent is sought from each prospective subject; (5) informed consent is documented; (6) the research plan ensures the safety of subjects, when appropriate; and (7) adequate provisions exist to protect privacy of subjects and confidentiality of data, when appropriate.<sup>211</sup> In obtaining informed consent, a researcher must provide the subject with certain information, such as the nature of the project, its risks and benefits to the participant, and the voluntary nature of the subject's participation.<sup>212</sup>

It is important to note two significant caveats to the regulations. First, in addition to their basic requirements, the regulations also establish additional protections for children involved as subjects in research.<sup>213</sup> For instance, in order for such a research project to receive funding, an IRB must find that the risks presented to children are minimal,<sup>214</sup> unless the research: (1) presents a prospective direct benefit to the individual subjects that outweighs the risks,<sup>215</sup> or (2) furthers the knowledge about the child's disorder or condition or the opportunity to understand, prevent, or ameliorate a serious problem which affects the health or welfare of children.<sup>216</sup> In these scenarios, the researcher must obtain the assent of the children's parents or guardians, and of the children if they are of a suitable

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211. See, e.g., 34 C.F.R. § 97.111 (2006); 45 C.F.R. § 46.111 (2006).

212. See, e.g., 34 C.F.R. § 97.116 (2006); 45 C.F.R. § 46.116 (2006). Specifically, informed consent requires providing each of the following to the subject:

- (1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation . . . ;
- (2) A description of any reasonably foreseeable risks or discomforts to the subject;
- (3) A description of any benefits to the subject or to others which may reasonably be expected from the research;
- (4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;
- (5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;
- (6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs . . . ;
- (7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights . . . ; and
- (8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time . . . .

34 C.F.R. § 97.116; 45 C.F.R. § 46.116.

213. See, e.g., 34 C.F.R. § 97.111(b); 45 C.F.R. § 46.111(b). See generally 34 C.F.R. §§ 97.401–09 (2006); 45 C.F.R. §§ 46.401–09 (2006) (propounding additional requirements for research involving children).

214. See, e.g., 34 C.F.R. § 97.404 (2006); 45 C.F.R. § 46.404 (2006).

215. See, e.g., 34 C.F.R. § 97.405 (2006); 45 C.F.R. § 46.405 (2006).

216. See, e.g., 34 C.F.R. §§ 97.406–07 (2006); 45 C.F.R. §§ 46.406–07 (2006).

mental state or psychological condition to understand the nature of the project, before initiating the research.<sup>217</sup>

Second, the policies set forth several settings that are exempt from their requirements. For example, the policies do not apply to research conducted in “established or commonly accepted educational settings, involving normal educational practices,” such as research on instructional strategies or using certain educational tests, surveys, or interviews.<sup>218</sup> In the case where the research involves children as human subjects, however, research involving interview or survey procedures is not exempt from IRB review and approval.<sup>219</sup>

#### 4. The Limitations of the Federal Regulations

As discussed, the federal regulations concerning the protection of human research subjects apply only to research conducted or funded by federal departments or agencies, such as the DHHS or DoE.<sup>220</sup> Despite the fact that some institutions, such as universities and medical schools, have pledged conformity with the regulations and have established their own IRBs that are applicable to all research irrespective of the source of funding, schools that administer surveys that are not supported by federal funds technically need not obtain informed consent as a prerequisite.<sup>221</sup> This poses a problem because there is probably no private right of action for parents to enforce the regulations. In other words, parents may not seek relief from a school that violates a regulation; nor may they compel the school to withdraw its administration of the surveys or cease its research.<sup>222</sup> In all probability, a school found to have violated such regulations will face only the consequence of a withdrawal of funds, and would thereby theoretically be free to continue to conduct its research without the support of federal funds.

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217. See, e.g., 34 C.F.R. § 97.408 (2006); 45 C.F.R. § 46.408 (2006). Unlike FERPA, these federal regulations pertaining specifically to children do not explicitly require a researcher to allow parents or students to examine sample questions of a survey before it is administered.

218. See, e.g., 34 C.F.R. § 97.101(b)(1) (2006); 45 C.F.R. § 46.101(b) (2006).

219. See, e.g., 34 C.F.R. § 97.401(b) (2006); 45 C.F.R. § 46.401(b) (2006).

220. See *supra* note 210 and accompanying text.

221. Jesse A. Goldner, *An Overview of Legal Controls on Human Experimentation and the Regulatory Implications of Taking Professor Katz Seriously*, 38 ST. LOUIS U. L.J. 63, 99 (1993).

222. See *id.* Indeed, Goldner suggests that the lack of federal funding is the consequence of violating the regulations. See *id.* at 103 (noting that “at a certain level, violations of the regulations would primarily be a concern of the institution whose governmental funding might be placed in jeopardy”).

This problem is further compounded by the fact that despite the supposed “safeguard” of IRB approval, some research proposals that should not be implemented due to their extremely dangerous nature are nonetheless approved by IRBs. *Grimes v. Kennedy Krieger Institute, Inc.*, a Maryland Court of Appeals opinion, directly addressed this issue in 2001.<sup>223</sup> In *Grimes*, the Environmental Protection Agency funded a study to be carried out by Kennedy Krieger Institute (“KKI”), a research establishment affiliated with Johns Hopkins University.<sup>224</sup> The research was designed to study the effectiveness and cost-efficiency of different lead abatement processes in houses because of the risk that lead in buildings presented to young children.<sup>225</sup> The project, over a two-year period, studied the blood of young children living in houses known to have lead paint.<sup>226</sup> In some situations, the families were already residing in the houses; in others, the families moved into the homes solely because of the study.<sup>227</sup> In all situations, KKI drafted consent forms that indicated the risks and benefits of the study, as well as the compensation the families would receive.<sup>228</sup> Initially, the institution’s IRB questioned the study as proposed,<sup>229</sup> but after requiring KKI to modify parts of its consent form, the IRB approved the study.<sup>230</sup> Families later sued, claiming that they were not sufficiently warned of the risks of the research.<sup>231</sup>

In its opinion, the Maryland court held that despite the IRB’s approval and the parents’ consent, the research study itself was fundamentally flawed because it exposed children to an impermissible risk.<sup>232</sup> Explaining that in this case, the risks presented to vulnerable children meant that “no degree of parental consent, and no degree of furnished information to the parents could make the experiment at issue here, ethically or legally permissible,”<sup>233</sup> the court explained the study was “wrong in the first instance.”<sup>234</sup> It further held that the parents were not provided with

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223. *Grimes v. Kennedy Krieger Inst., Inc.*, 782 A.2d 807 (Md. Ct. App. 2001).

224. *Id.* at 811, 819.

225. *Id.* at 819.

226. *See id.* at 820–21.

227. *Id.* at 821–23.

228. *Id.* at 824–25.

229. *See id.* at 814.

230. *See id.* at 813, 824–25.

231. *Id.* at 825–26.

232. *Id.* at 858.

233. *Id.* at 857–58.

234. *Id.* at 858. The court also noted:

A researcher’s duty is not created by, or extinguished by, the consent of a research subject or by IRB approval. The duty to a vulnerable research subject is independent of consent,

adequate information about the risks to their children because the parents were not clearly informed that lead ingestion by the children was anticipated.<sup>235</sup> Finally, the court explained that even if full disclosure were given, parents should not have been permitted to consent to the risks due to the nature of those risks.<sup>236</sup> Thus, the court found that an IRB's review of a proposal and parental consent are not always sufficient safeguards to protect children who are research subjects.<sup>237</sup> In this case, the IRB seemed to fail to appreciate the risks associated with the research,<sup>238</sup> and despite its independent review of the project and parental consent, the court reversed the trial court's grant of summary judgment in favor of KKI and remanded the case to determine the potential liability of the research institution.<sup>239</sup>

*Grimes* was not the first recognition that IRBs may not always provide adequate protection to parents and their children. In fact, critics have long recognized the inherent limitations of IRBs and their review processes.<sup>240</sup> For example, only 3000 to 5000 local IRBs deal with the thousands of studies across the United States at any given time, and because some of them deal with up to 2500 proposals every year,<sup>241</sup> many IRBs may be overworked.<sup>242</sup> Moreover, IRBs may not be sufficiently trained in research involving human subjects, particularly in the areas of complex research.<sup>243</sup> And because IRBs are typically dominated by scientists, they usually lack

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although the obtaining of consent is one of the duties a researcher must perform. All of this is especially so when the subjects of research are children.

*Id.* at 850.

235. *Id.* at 844.

236. *Id.* at 858. The court stated, "We hold that in Maryland a parent . . . cannot consent to the participation of a child . . . in nontherapeutic research of studies in which there is any risk of injury or damage to the health of the subject. *Id.*"

237. *See id.* at 814–18.

238. Hazel Glenn Beh, *The Role of Institutional Review Boards in Protecting Human Subjects: Are We Really Ready to Fix a Broken System?*, 26 LAW & PSYCHOL. REV. 1, 12 (2002).

239. *Grimes*, 782 A.2d at 858.

240. *See Beh, supra* note 238, at 23 (noting that the *Grimes* court was not alone in concluding that the "current system is seriously deficient"). In fact, in 1998, the Office of Inspector General issued a report that acknowledged the limitations of IRBs. *Id.* at 34.

241. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., INSTITUTIONAL REVIEW BOARDS: THEIR ROLE IN REVIEWING APPROVED RESEARCH 3, 9 (1998), available at <http://oig.hhs.gov/oei/reports/oei-01-97-00190.pdf> [hereinafter IRB REPORT]. IRBs may be associated with hospitals, academic centers, government agencies, or for-profit organizations. *Id.* at 3.

242. *Id.* at 9 (noting that "IRBs of all sizes are facing major workload demands" and that "[t]hese workload pressures jeopardize the protections afforded by IRBs"). *See also Beh, supra* note 238, at 35 ("[T]he workload of the average IRB has increased to the point that they are unable to provide meaningful review.").

243. *See IRB REPORT, supra* note 241, at 11.

members who can provide a nonscientific perspective and who can keep them “attuned to the perspectives and experiences of human subjects.”<sup>244</sup>

Thus, IRBs themselves contain inherent limitations that prevent them from properly protecting humans used as subjects of research. The problem is further exacerbated by the fact that federal regulations contain a restriction in that research projects that are not funded by a federal department or agency need not even seek IRB approval.<sup>245</sup> Consequently, like FERPA or PPRA, the federal regulations may not adequately afford parents protection from their children being used as human subjects for research in public schools. As a last resort, parents may turn to state statutes. But because many of these statutes contain the inherent flaws that are present in their federal counterparts, they are also unlikely to grant parents any protection.

### C. STATES’ CURRENT RESPONSES AND WHY THEY MAY NOT PROVIDE PARENTS WITH RELIEF

Driven by some of the shortcomings of the federal laws, some states have decided to take matters into their own hands by passing laws aimed to protect children in social research. In January 2001, New Jersey passed a law entitled “Protection of Pupil Rights”<sup>246</sup> in response to growing concerns about the legitimacy and strength of parental interests in protecting their children—in fact, the most important catalysts for enacting the law were the events surrounding the survey in *Ridgewood*.<sup>247</sup> Similar to the federal PPRA statute, the New Jersey law requires parental consent for a school’s administration of a survey that seeks particular types of information, such as information about mental and psychological problems or sexual behavior and attitudes.<sup>248</sup> The New Jersey statute differs from the

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244. *Id.* A similar critique is that IRBs may sometimes exhibit a systematic bias that favors allowing research; specifically, IRBs may, at times, be reluctant to disapprove a proposed project because of collegiality and institutional loyalty. *See* Beh, *supra* note 238, at 40. *See also* Grimes, 782 A.2d at 817 (noting that IRBs “are not designed, generally, to be sufficiently objective in the sense that they are as sufficiently concerned with the ethicality of the experiments they review as they are with the success of the experiments”).

245. This Note does not consider the possibility of Congress regulating human subject research generally under the Commerce Clause or Section 5 of the Fourteenth Amendment. *See infra* Part V.

246. *See generally* 2001 N.J. Laws 364 (codified at N.J. STAT. ANN. § 18A:36-34 (West 2006)) (requiring parental approval for school programs attempting to acquire certain information from students).

247. *See* Cheryl Wetzstein, *Consent Required for ‘Nosy’ Surveys: Parental Outcry Spurred N.J. Law*, WASH. TIMES, Jan. 14, 2002, at A5.

248. N.J. STAT. ANN. § 18A:36-34a. Like the federal PPRA, the New Jersey statute lists eight categories of information that require parental consent. *See id.*

federal PPRA in three significant ways, however. First, any school district that violates this law would be subject to monetary damages,<sup>249</sup> though the statute does not explicitly state whether these damages would be the result of suits filed by parents. Second, New Jersey sought to expand the scope of its statute by making it applicable to all surveys regardless of whether or not they make use of federal funds.<sup>250</sup> Third, New Jersey's statute applies to any administration of a survey, not just those that students are "required" to take.<sup>251</sup> Thus, the New Jersey statute is broader than its federal counterpart.

Although it is theoretically possible for parents to find statutory relief under laws such as the one enacted in New Jersey, such a possibility remains very slim for several reasons. First, some states have yet to enact statutes that call for parental consent as a prerequisite to administering a survey,<sup>252</sup> which indicates that some parents will not be able to turn to this type of protection. Second, even in the states that have passed statutes addressing parental rights in this context, many of the laws are not as broad in scope as New Jersey's. The laws, though all similar, are not completely identical and provide for a range of requirements. Although some statutes are more demanding, such as the Alaska and Utah laws, which apply as long as surveys are "administered" to students,<sup>253</sup> other statutes, such as Colorado's and Indiana's, have narrower protections and apply only if students are *required* to participate in the surveys. Many laws, then, do not afford adequate protection because they probably do not require parental notification if the surveys are merely voluntary.<sup>254</sup>

In sum, though some state laws offer relief to parents on their face, they may in reality do very little to afford protection. Not only are these types of statutes nonexistent in some states, but also those that do exist

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249. *Id.* § 18A:36-34d.

250. *See id.* § 18A:36-34.

251. *See id.* § 18A:36-34a. Nowhere does the statute state that a student is "required" to take the survey in order for the statute to apply; instead, the school must merely "administer" the survey in order to trigger the provisions of the statute. *See id.*

252. Minnesota, for example, seems not to have enacted such a law, while some of the states that have include Alaska, California, Colorado, Indiana, Nevada, Utah, Virginia, and Washington. *See* ALASKA STAT. § 14.03.110 (2006); CAL. EDUC. CODE § 51513 (West 2006); COLO. REV. STAT. § 22-1-123 (2002); IND. CODE § 20-30-5-17 (2005); NEV. REV. STAT. § 392.029 (2002); UTAH CODE ANN. § 53A-13-302 (2000); VA. CODE ANN. § 22.1-79.3.B (2006); WASH. ADMIN. CODE § 392-500-030 (2006).

253. ALASKA STAT. § 14.03.110(a); UTAH CODE ANN. § 53A-13-302(1).

254. *See* COLO. REV. STAT. § 22-1-123(5)(a); IND. CODE § 20-30-5-17(b). Similarly, Nevada's statute refers specifically to the federal PPRA, suggesting that the state's statute does not apply to surveys that are merely "voluntary." *See* NEV. REV. STAT. § 392.029.

possess many of the same flaws that surround the federal PPR. Thus, like federal statutes and regulations, state laws are unlikely to afford adequate protection to parents who wish to prevent their children from being used as social research subjects. Until states uniformly adopt statutes similar to New Jersey's, parents will inevitably continue to face a challenge in fighting for their rights.

#### V. A PROPOSED SOLUTION: STATE LEGISLATURES SHOULD REQUIRE ALL LOCAL SCHOOL DISTRICTS TO ADOPT POLICIES REGULATING THE REVIEW OF SURVEY PROPOSALS IN PUBLIC SCHOOLS

As suggested thus far by this Note, parents are not likely to find protection from social research surveys in public schools under the legal regime as it exists today. Not only will the Constitution, as well as statutes and regulations, likely fail in regulating schools that administer such surveys, but also parents probably lack any form of remedy under the common law.<sup>255</sup> Thus, their only avenue of security is under some form of legal reform. One potential solution is for Congress to strictly regulate the research using human subjects in public schools under the Commerce Clause<sup>256</sup> of the Constitution or Section 5 of the Fourteenth Amendment.<sup>257</sup> This option, however, may prove unworkable due to the substantive limitations imposed by these provisions themselves,<sup>258</sup> as well as federalism constraints on Congress.<sup>259</sup> Alternatively, states themselves may choose to regulate social surveys administered in public schools. This Part of the Note argues that state legislatures should require all local school districts to adopt policies concerning survey proposal reviews, parental consent, and opt-in procedures in schools because local school districts,

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255. See Areen, *supra* note 20, at 13–14.

256. U.S. CONST. art. I, § 8. The Commerce Clause states that “The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States.” *Id.*

257. U.S. CONST. amend. XIV, § 5. Section 5 states that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” *Id.*

258. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (stating that Congress may not create or expand rights under Section 5 of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 558–68 (1995) (holding a law unconstitutional because it was not substantially related to interstate commerce and thus not part of Congress’s power under the Commerce Clause).

259. See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that Congress cannot direct state executive agencies to enforce a federal regulatory program); *New York v. United States*, 505 U.S. 144, 161 (1992) (holding that Congress cannot commandeer state legislatures by directly compelling them to enact a federal regulatory program). This Note does not examine the possibility of regulation under the Commerce Clause or Section 5 of the Fourteenth Amendment. An investigation of the feasibility of these proposed solutions would require considering federalism issues, such as those arising under the Tenth Amendment or from the Constitution’s basic structure.

with oversight from state legislatures, are in the best position to afford protection to parents in this context. It then proposes general issues that a model local policy should address.<sup>260</sup>

#### A. THE NEED FOR STATE LEGISLATURES TO ACT

To give parents protection from the use of social surveys in public schools, state legislatures should require local school districts to develop policies that establish a Review Committee (“Committee”) and that set forth a review process for all survey proposals, especially those that seek sensitive information. This process consists of two discrete steps. First, states should create statutes that specifically require all school districts to set forth a review process by a Committee of all survey proposals, whether federally funded or not, in public schools. The statutes should ensure that each Committee’s review process requires a consideration of certain general criteria, such as an analysis of a survey’s purported goals and a comparison of risks to benefits, in determining whether a proposed survey should be accepted. Second, each school district should subsequently adopt its own specific, individual policy setting forth not only how to evaluate such proposals, but also how to implement parental consent and opt-in procedures.

This system, which requires both state legislation and localized responses by individual school districts, will likely prove effective for several reasons.

First, legislative pressure will force local school districts to act. Currently, many school districts may be unwilling to take an affirmative step in implementing policies regulating social surveys in public schools absent some external pressure, as adopting policies would undoubtedly present some costs, which include not only monetary ones but also those arising because of the time and effort mandated by drafting and enforcing such policies.<sup>261</sup> Moreover, school districts may be hesitant to promulgate

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260. This Note concentrates on the need for reform in how surveys are administered in public schools, though the reform this Note proposes could be applied, with minor changes, to surveys in private schools.

261. It is important to note, however, that there are a number of school districts and counties that have already implemented policies regulating research in public schools, though none are designed specifically to address the use of surveys. For a sampling of different policies, see GARRETT COUNTY BD. OF EDUC., POLICIES AND PROCEDURES HANDBOOK, REQUESTS TO DO RESEARCH IN THE GARRETT COUNTY PUBLIC SCHOOLS, *available at* [http://www.ga.k12.md.us/Policies/900/941\\_6.htm](http://www.ga.k12.md.us/Policies/900/941_6.htm) (last visited Mar. 13, 2007); NEW YORK CITY BD. OF EDUC., CONDUCTING RESEARCH IN THE NEW YORK CITY PUBLIC SCHOOLS, PROPOSAL GUIDELINES, *available at* [http://www.baruch.cuny.edu/irb/documents/research\\_in\\_nyc\\_schools.pdf](http://www.baruch.cuny.edu/irb/documents/research_in_nyc_schools.pdf) (last visited Mar. 13, 2007).

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rules that would strictly regulate and thereby somewhat encumber their ability to gather potentially beneficial social data. Thus, local school districts currently need motivation to act.

Second, because FERPA and PPRA do not establish private rights for parents,<sup>262</sup> state legislatures should establish a private cause of action for parents against, for example, a school district itself. A state statute could ensure that a remedy for parents exists against a school district if it fails to adopt or implement a policy, or alternatively, if it breaches an existing one. An effective remedy established by statute may include an injunction—for example, a parent could prevent a school from either administering a survey to his or her child, if it has not already done so, or from using the results of the survey in any way. If an injunction is not plausible because the survey has already been administered and the results used, monetary damages could be awarded under the statute to punish a school that does not follow established procedures,<sup>263</sup> especially in situations where it can be shown that children suffered actual mental harm. In the event that a school administers a survey without first obtaining Committee approval, school officials should be held liable; however, in the event that a Committee approves a proposal in violation of review policies, individual Committee members could be held liable. Overall, a statutory remedy, whether in the form of an injunction or damages, would give meaning to the state statute and would obviate the current restriction that entrusts enforcement of these rights solely to the secretary of education.

Third, a well-drafted state statute would ensure uniformity and efficiency among localized school district policies. School districts' review procedures may be less effective without state oversight given their potential interest in themselves and in allowing research. A detailed statute explicitly setting forth the minimal issues that a policy must address, such as parental notification and consent procedures, and allocation of responsibility between the school system and the Committee, would ensure comprehensive and consistent protection for parents.

At the same time, requiring school districts to ultimately promulgate their own policies would allow for some flexibility in the system, which would indirectly benefit parents and their children. Each school district is in the best position to decide how to handle certain aspects of regulating the use of social surveys in its own local community. Local school districts can

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262. *See supra* Part IV.B.2.

263. This proposal, however, which imposes monetary damages on schools, may require a state to amend not only its punitive damages statutes, but also perhaps its sovereign immunity laws.

most accurately gauge the types of resources at their disposal, thereby allowing each to most efficiently adopt a policy that accounts for limited resources. At the same time, this would allow local Committees, instead of the government, to more easily investigate potential violations. Thus, requiring a school district to address certain issues but leaving it free to decide *how* to address them, would allow individual districts to have some leeway in drafting their own policies, which could potentially be one of the most useful forms of protection.

Finally, states are able to draft statutes that are broad enough to encompass all types of surveys in order to maximize their applicability. For example, the statutes should apply to both federally funded and nonfunded surveys.<sup>264</sup> Similarly, the statutes should govern all surveys that involve the participation of children, whether such participation is merely requested or required.<sup>265</sup>

#### B. THE NEED TO CREATE REVIEW COMMITTEES WITHIN LOCAL SCHOOL DISTRICTS

As discussed previously, the states' legislative efforts should ensure that each local school district establishes its own Committee that is responsible for overseeing the administration of all surveys in public schools.<sup>266</sup> Unlike local IRBs, which are responsible for overseeing many types of research, the Committee would be responsible only for approving survey proposals to be conducted in public schools. Strictly narrowing each Committee's jurisdiction would eliminate the problems posed by the lack of time and resources that currently plague local IRBs.<sup>267</sup> All proposals for surveys, whether submitted by an external researcher or a school itself, would be forwarded to the Committee, which would subsequently review all such proposals carefully. To reach an informed decision, the Committee would review all submitted materials and ask questions when necessary to obtain complete information. To avoid the cost and time associated with an appeals process and to afford a degree of finality to a decision, any decision

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264. This would address the fact that PPRA applies only to federally funded research. *See supra* Part IV.B.1.

265. This would address the fact that PPRA applies only to surveys that students are required to take. *See supra* Part IV.B.2.

266. Many of the suggestions this Note proposes relating to the establishment and membership of IRBs are drawn from the current federal regulations with some modifications.

267. *See supra* Part IV.B.4.

concerning whether to grant or deny access to a school's students would be deemed final.<sup>268</sup>

State statutes should also ensure that Committees are composed of, at a minimum, members with certain qualifications to minimize bias and maximize accuracy in the review process. First, the Committee should be comprised of one or more employees from each of the district's educational sectors, such as from an elementary school, a middle school, and a high school. The primary role of these members, which can include teachers, administrators, or superintendents, is to understand the particular community's students and needs. Second, the Committee should include at least one parent of an elementary, middle, and high school student residing in the particular community, as parents have invaluable insight into the community's youth and can provide a nonscientific point of view that primarily considers the wellbeing of schoolchildren. Third, a child or adolescent psychologist should fill a role in the Committee. An extensively trained expert is needed to understand the development of children and adolescents and would be a useful person to turn to when specifically analyzing the potential effects certain questions in a particular survey may have on students.

### C. SUGGESTED ELEMENTS OF AN IDEAL POLICY

Finally, in order to afford maximum protection to parents, local school districts must be sufficiently specific and detailed in their policies. Consequently, state statutes, in order to be effective, must ensure that localized policies address at least certain basic points, including some of which currently exist under federal regulations.<sup>269</sup> Basic considerations that a school district's ideal policy must address should, at a minimum, include: (1) a process for analyzing and reviewing the purpose and methodology of the proposed survey, (2) possible costs and harms as compared to the potential of realizing benefits, and (3) informed parental consent and opt-in provisions.

#### 1. Purpose and Methodology of the Survey

First, an ideal policy should ensure that the Committee considers the stated purpose or goal of the survey in determining whether to grant or

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268. Furthermore, a Committee's decision should not be subject to administrative review within a school board or school district, given their likely bias in favoring research that directly benefits them.

269. In fact, many of the proposals in this Section of the Note are drawn heavily from the current federal regulations.

deny researchers access to students. Policy concerns may support granting permission for certain types of surveys while denying it for others.<sup>270</sup> For example, the Committee may grant permission for surveys that will be used directly for legitimate educational activities, such as surveys whose results may be used to improve academic teaching methods and curricula.<sup>271</sup> Conversely, it could deny access for a survey that is indirectly related to educational activities, such as surveys designed to examine children's mental or physical health,<sup>272</sup> as these surveys are tangential to a school's mission and could pose great risks to children that are difficult to justify. The Committee could also similarly deny surveys designed to gather social information relating to children's attitudes and values, as obtaining this information is markedly peripheral to education and is arguably not part of a school's role.

An ideal policy should also ensure that the Committee examines the methodology of the study. This analysis is important because of the inherently difficult nature of constructing sound methodologies in social research. As some researchers have noted, social scientists are expected to address pressing issues surrounding children and adolescents, yet "the traditional tools of the social sciences do not equip them to bridge the gap between the requirements of research rigor on the one hand, and legal and ethical requirements on the other."<sup>273</sup> Thus, social scientists face difficulties in addressing issues such as the vulnerability of children, the

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270. In 1969, Robert Clasen examined the categories of research for which school administrators are likely to grant access to students. Clasen et al., *supra* note 145, at 19. His results indicate that administrators are more likely to grant research access to the following types of studies, in decreasing order of popularity: research to improve teaching, research on guidance problems, research on health, research on learning and concept attainment, research on attitudes and values, and research on creativity. *Id.*

271. Of course, a researcher who seeks to validate a survey proposal because of its purported improvement of teaching and curriculum may only do so if the teaching and curriculum are legitimate and lawful school activities. For example, because a school may not constitutionally dictate a particular curriculum that is motivated by a religious purpose, a researcher may not validate a survey seeking information about students' religious beliefs in order to better create a religious instruction curriculum in public schools. *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (striking down a Louisiana law requiring that "creation science" be taught alongside the theory of evolution because the law advanced a particular religious belief); *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968) (striking down an Arkansas statute that prohibited the teaching of evolution in public schools under a similar rationale).

272. For example, in *Fields*, the health counselor sought to validate such a survey by claiming that it would help the school reduce barriers in learning by gauging exposure to early trauma. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (9th Cir. 2005), *amended and reaff'd*, 447 F.3d 1187 (9th Cir. 2006). Though the results of such a survey would not directly affect educational methods or curricula in school, they could nonetheless indirectly improve the school's education by molding the teaching methods to match the students' mental health needs.

273. Stanley & Sieber, *supra* note 12, at 3–4.

factors to consider in evaluating the ethics, legality, and psychological appropriateness of a particular research project, and how to explain participation to children.<sup>274</sup> Overall, the Committee's examination of a survey's methodology would require the Committee to examine the researcher's hypothesis, how the researcher designed the survey and the questions to test the hypothesis, and how the results will be used to either confirm or disconfirm the hypothesis. It would also require the Committee to examine the researcher's choice of test subjects, including each subject's age and mental status.

## 2. Cost and Benefit Analysis

An ideal statute must also ensure that local policies allow Committees to weigh the potential costs against the potential benefits of a proposed survey. Potential "costs" should include any potential risks or harm to which children may be exposed, though oftentimes such risks and harms are difficult to measure. Specifically, because children encompass "a diverse range of backgrounds, characteristics, and prior experiences" at any given age, it is difficult to predict the precise vulnerability of any given child.<sup>275</sup> Moreover, since some children possess characteristics that likely make them more vulnerable to "certain domains of research risk," estimating the potential harm and risks to children participating in social research requires significant care, thought, and sensitivity.<sup>276</sup>

In evaluating such risks or harms, the Committees must consider certain criteria. First, a Committee must consider whether the risks are more than minimal. A Committee may choose to adopt the federal regulation's definition of "minimal risk"—whether the risks or potential harm is greater than those "ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests"<sup>277</sup>—noting that more than minimal risks may be harder for a researcher to justify.<sup>278</sup> Second, the Committee must take into consideration the age and mental status of the children used as research

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274. *Id.* at 4–5.

275. *See* Thompson, *supra* note 122, at 50. The author continues: "In many instances the special characteristics of the children who participate mandate special consideration in the ethical review of research, either because these characteristics introduce special vulnerabilities or provide added resiliency to research risks." *Id.*

276. *Id.* at 51.

277. This definition of "minimal risk" is taken from the current federal regulations on protection of human subjects. *E.g.*, 45 C.F.R. § 46.102(i) (2006).

278. *See, e.g.*, 45 C.F.R. §§ 46.405–06 (2006) (discussing research involving greater than minimal risk).

subjects, keeping in mind that potential risks may increase as age decreases.<sup>279</sup> For example, the potential cost or harm in administering a survey that seeks information relating to sexual behavior or drug use is much higher for elementary school students than for high school students. Third, considering the total “cost” of a survey must account not only for monetary costs, but also for the time and effort that would be required by the children and the school. Naturally, surveys that require a longer period of time are harder to justify because they decrease the time that teachers spend teaching and students spend learning.

In considering a proposed survey’s benefits, the Committee should account for benefits presented both to children and to the school. In other words, local policies must allow a Committee to estimate the directness and magnitude of the claimed benefits. For example, a survey whose results could ultimately be used to improve teaching strategy based on students’ learning styles would likely produce a higher benefit than a survey that is used merely to gather information about students’ opinions and attitudes about their friends or family without improvement of any educational activities. Along the same lines, a study that produces results that benefit society in general, but does not produce a direct benefit to the children being used as subjects themselves, should also be scrutinized more closely.<sup>280</sup> In this sense, a general research project, such as one conducted by an anthropologist, that is not connected to a specific educational program, would be harder to justify. Moreover, school districts must also consider the probability that the benefits will actually be realized. In other words, a survey that presents a stated benefit that could have a great positive effect on a community but has a relatively small chance of actually occurring may be harder to justify, even if potential risks and costs are relatively low.

After examining both costs and benefits of a proposed survey, the Committee must weigh one against the other. If the overall costs of a proposed survey outweigh the benefits, the Committee should simply not approve the survey. If the overall benefits of the survey outweigh the costs, however, the Committee should consider approving the survey proposal, though this cost and benefit analysis must be considered alongside the analysis of the purpose and methodology of the survey. This means that even if a survey’s benefits outweigh its risks, a Committee may nonetheless deny the proposal if the survey’s methodology is weak and unlikely to

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279. See Thompson, *supra* note 122, at 40.

280. This analysis, which essentially distinguishes between direct and indirect benefits to children, parallels the federal regulations. See 45 C.F.R. § 46.406.

generate usable data, or if the purpose of the survey is irrelevant to a school's concerns.

### 3. Informed Consent and Opt-in Procedures

If the Committee approves the administration of a survey, local policies should set forth methods to inform parents of the impending research. For example, a school or school district could well send letters directly to each of the parents of any student who is identified as a potential test subject or could, alternatively, send such letters home with the students. Moreover, policies should also clearly establish what substantive information about a survey must be disclosed to ensure that parents who consent to a survey have sufficient information to make an informed decision. To ensure that parents' decisions are indeed informed, letters to parents should disclose information such as: (1) the details about the research, including the purpose of the survey as well as its anticipated risks and benefits; (2) how the researcher plans on using the results of the survey; (3) the time, effort, and level of commitment required by students; (4) the subject matter of the survey by describing, in detail, the types of questions that will be asked; and (5) the possible harms caused by the survey. The explanation of possible harms must be specific; for example, if a survey seeks information relating to sexual behavior or substance use, the notification letter must explicitly state so and disclose the questions' potential risks and emotional reactions from students. To that end, merely stating that the survey contains questions relating to a student's social behavior would be insufficient.

Perhaps even more importantly, the policies must further establish procedures to obtain the informed consent of the parents, even if the Committee deems a particular survey appropriate for students.<sup>281</sup> In order to ensure that parents' decisions to permit their children's participation are truly "voluntary," notification letters should contain opt-in provisions by clearly communicating to parents that their permission is required before a school will administer a survey to their children.<sup>282</sup> Opt-in provisions likely

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281. To protect a child's rights, the informed consent of parents is a supplement to and does not replace the child's own consent. *See* France, *supra* note 154, at 183 ("One of the problems about the debate over parental rights and young people's choice is that it detracts us from the main issue—that of getting *informed* consent from young people."). This requires that a researcher explain to the child the reasons for the research, what rights the child has, and, perhaps most importantly, that the child is free to withdraw from the research at any point. *Id.* at 183–84.

282. There is a potential drawback, however, that not enough parents would participate because of the opt-in procedure. Though a legitimate concern, the drawback does not undermine this procedure because of the high importance of protecting children's welfare.

offer a stronger form of protection for parents than opt-out provisions because they require parents to take an affirmative step,<sup>283</sup> and are also preferable because they avoid problems associated with parents forgetting or not knowing how to opt their children out. Consequently, a policy should establish clear and strict procedures for parents to opt their children in. One way is for a school to send, along with the notification letter, a signature slip seeking the consent of a parent. This relatively low cost method would not only be an efficient means for the researcher to obtain the informed consent of parents, but also would afford parents a heightened degree of protection.<sup>284</sup>

In sum, a well-drafted policy that addresses all of the issues discussed above would likely be an effective means of affording protection to parents who fear that their children are being used as research subjects in public schools. Disclosure to parents of sufficiently detailed information regarding the research and requiring them to opt their children in ultimately affords parents a higher degree of power and control, and would thereby help prevent students from facing surveys that parents deem inappropriate. Moreover, the effect of these policies would be strengthened by state statutes, which would provide a blanket regulation of all the policies from various school districts. Thus, states should seriously consider requiring all school districts in the particular state to adopt and implement policies setting forth the evaluation process of survey proposals, as well as parental informed consent and opt-in procedures. Indeed, this type of action is needed in order to give children the protection they need.

## VI. CONCLUSION

Perhaps Vanessa Shetler should not have been so astounded to learn that her eight-year-old son was asked to participate in a sexually explicit survey one seemingly ordinary day in school. After all, researchers have depended more and more on the public school system to carry out social research, and schools have not always been efficient gatekeepers in preventing inappropriate surveys from entering the schoolhouse gates. As a result, students of all ages across the country are being asked questions

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283. See Alderson, *supra* note 21, at 105 (noting that ideally, research should be opt-in rather than opt-out, and though it takes more time and is more burdensome on researchers, it respects people's privacy and free choice).

284. Though perhaps some of the most important, the suggestions proposed by this Note are by no means the sole considerations that local policies should address. As a simple example, a school district should also consider drafting provisions establishing relevant procedures in situations where a child or parent does not understand the English language.

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relating to sex, alcohol, drugs, and other “risky” behaviors. As many have acknowledged, however, these questions can oftentimes be considered themselves just as “risky.”

That is precisely the reason why parents should have the final say as to what types of research their children are being subjected to at school. Traditionally, parents have been the decisionmakers for their young children, many of whom are innocent, curious, and vulnerable. Not only do parents have a duty to raise their children and make decisions for them, but they also have the right to act in their best interest. As a result, the legal system should help parents in taking these steps necessary in protecting the health and welfare of their children.

Yet the system, as it exists today, has done exactly the opposite by significantly weakening parents’ right to protect their children, and this trend has become undeniable within the context of the school. Given a state’s compelling interest in maintaining the welfare of children and in upholding an effective educational system, courts are likely to find that although parents have a fundamental right in protecting their children from potentially harmful research, researchers will nonetheless be allowed to continue administering social surveys in public schools. To address this problem, it is not enough to turn to Congress, as its past attempts to regulate in this area have proven ineffective. Thus, it is time for more. States, in conjunction with local school districts, must work to create laws and policies that require school districts to regulate the administration of surveys in public schools. It is not until then that the country’s future will truly be protected.