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LETTER FROM THE EDITOR

Dear Readers:

The *Richmond Journal of Law and the Public Interest* is proud to present the spring issue of Volume XVI. The issue examines issues affecting children's rights and education. The articles reveal our legal system's struggle to balance choice, constitutional freedoms, and the mental and physical health of our children.

In *Is Circumcision Legal?*, Peter W. Adler discusses the history and medical implications of the practice of circumcision. He notes the dangers associated with this elective surgery and highlights a recent court decision in Germany in which circumcision is deemed criminal assault. Additionally, the piece compares the lack of circumcision regulation to federal laws prohibiting female genital mutilation. Adler urges American courts and legislatures to treat non-therapeutic circumcision as an impermissible violation of a child's genital integrity.

Reclaiming Hazelwood: Public School Classrooms and a Return to the Supreme Court's Vision for Viewpoint-Specific Speech Regulation Policy, by Brad Dickens, provides an updated perspective on the Supreme Court's ruling in *Hazelwood v. Kuhlmeier*. The *Hazelwood* case requires that student speech and expression be viewpoint neutral; Dickens argues that the Supreme Court's holding was intended to be a narrow exception which the federal circuits have since over-applied. If *Hazelwood* is applied appropriately, Dickens believes schools are better able to carry out their educational missions and students may exercise their First Amendment rights more appropriately.

The spring issue also contains two student comments. The first, *Whose Choice Are We Talking About? The Exclusion of Students With Disabilities From For-Profit Online Charter Schools* by Matthew D. Bernstein, discusses the impact of for-profit and online education on special education students. The comment analyzes both

the rise of “educational management organizations” and the trend of special education students being pushed out of for-profit schools due to the expense of providing special education services. Dickens urges states to create laws regulating online charter schools, to require educational management organizations to make their finances transparent, and to connect charter schools to a special education infrastructure.

The second comment author, Stephanie Fitzgerald, discusses some of the successes and failures of the “No Child Left Behind” federal education legislation in *No Child Left Behind in Special Education: The Need for Change in Legislation That Is Still Leaving Some Students Behind*. The comment specifically analyzes the relationship between No Child Left Behind and special education students. Fitzgerald highlights scholars’ arguments that the current legislation is unreasonable, unfair, and unrealistic for students with learning disabilities. She discusses the need for research-based instructional methods, heightened accountability, increased parental input, and flexibility in the use of funding.

Thus, Volume XVI’s spring issue examines a few of the ways in which our society is struggling to protect the rights of our children. The debate includes issues of physical well-being, educational opportunity, and constitutional rights. The editors and staff of the *Richmond Journal of Law and the Public Interest* hope these pieces enrich the dialogue regarding children’s rights, and we look forward to bringing you forthcoming publications.

Sincerely,

Rachel W. Logan

Editor-in-Chief

IS CIRCUMCISION LEGAL?

Peter W. Adler***

INTRODUCTION

An important, divisive,¹ and unanswered question of American law – and indeed of international law – is whether it is legal to circumcise healthy boys.

American medical associations² and experts assert that circumcision is a common,³ safe,⁴ and relatively painless⁵ procedure with many medical benefits⁶ that exceed the risks.⁷ They argue that insurance should pay for it.⁸ Some religious organizations argue that circumcision is a sacred religious ritual.⁹ In any event, proponents claim that parents have a general

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Disclosure: no ethical conflict.

1. Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. POL'Y & L. 497, 497 (2002).

2. American medical associations have published numerous circumcision policy statements since 1971. These associations include the American Academy of Pediatrics (“AAP”), American Medical Association (“AMA”), American Academy of Obstetricians and Gynecologists (“ACOG”), and American Academy of Family Physicians. *E.g.*, American Academy of Pediatrics, *Male Circumcision*, 130 PEDIATRICS, no. 3, 2012, at e756, <http://pediatrics.aappublications.org/content/130/3/e756.full>. The ACOG has endorsed the 2012 AAP Report. *Id.* at e757.

3. *Id.* at e757.

4. David Perlestein, *Circumcision: The Surgical Procedure*, MEDICINET, http://www.medicinenet.com/circumcision_the_surgical_procedure/article.htm (last visited Nov. 16, 2012).

5. *Male Circumcision*, *supra* note 2, at e757 (“Analgesia is safe and effective in reducing the procedural pain associated with newborn circumcision.”); *Male Circumcision*, *supra* note 2, at e770–71 (describing subcutaneous ring block injections and dorsal penile nerve block injections as effective techniques in mitigating pain and its consequences during circumcision of newborns).

6. *Id.* at e756 (“Specific benefits from male circumcision were identified for the prevention of urinary tract infections, acquisition of HIV, transmission of some sexually transmitted infections, and penile cancer.”).

7. *Id.* at e772 (citing two large U.S. hospital-based studies estimating ‘the risk of significant acute circumcisions in the United States to be between 0.19% and 0.22%’).

8. *Id.* at e757 (“The preventive and public health benefits associated with newborn male circumcision warrant third-party reimbursement of the procedure.”).

9. *E.g.*, *In re Marriage of Boldt*, 176 P.3d 388, 393–94 (Or. 2008) (accepting the arguments of the American Jewish Congress and the Union of Orthodox Jewish Congregations of America that a father

and religious right to make the circumcision decision.¹⁰ They can point to the fact that no physician has ever been held liable by an American court for a properly performed circumcision.¹¹

Legal scholars,¹² foreign medical associations,¹³ intactivist organizations,¹⁴ and increasing numbers of men¹⁵ claim the opposite, namely that circumcision is painful,¹⁶ risky,¹⁷ harmful, irreversible surgery¹⁸ that benefits few men, if any.¹⁹ These opponents of circumcision argue that, in any event, boys have a right to be left genitally intact,²⁰ like girls under federal law,²¹ and to make the circumcision decision for

has the right under the freedom of religion clause to make the circumcision decision).

10. *Male Circumcision*, *supra* note 2, at e778 (“Parents should weight the health benefits and risks in light of their own religious, cultural, and personal preferences, as the medical benefits alone may not outweigh these other considerations for individual families.”).

11. *But see* Joe Kennedy, *Man Takes on Circumcision as His Cause Celebre*, THE ROANOKE TIMES, Apr. 23, 2005, <http://www.roanoke.com/columnists/kennedy/wb/xp-22348> (recounting how, in 2003, William Stowell settled a lawsuit arising from a properly performed circumcision in part by claiming that it is unlawful for physicians and hospitals to circumcise healthy, non-consenting minors).

12. R.S. Van Howe et al., *Involuntary Circumcision: The Legal Issues*, 83 BRIT. J. UROLOGY 63, 63 (Supp. 1 1999) (“Recently, legal scholars have challenged the legality of neonatal circumcision.”).

13. *See generally*, e.g., Symposium, *The Law & Ethics of Male Circumcision – Guidance for Doctors*, 30 J. MED. ETHICS 259 (2004); *see also* Fetus and Newborn Comm. of the Canadian Paediatric Soc’y, *Neonatal Circumcision Revisited*, 154 CAN. MED. ASS’N J. 1996 769, 769–80; Austl. Med. Ass’n, *Circumcision Deterred*, 6-20 AUSTL. MED., 1997, at 1, 5, available at <http://www.cirp.org/library/statements/ama2/>; Royal Australasian Coll. of Physicians, *Circumcision of Male Infants*, PEDIATRICS & CHILD HEALTH DIV., Sept. 2010; Royal Dutch Med. Ass’n, *Non-Therapeutic Circumcision of Male Minors* (2010), <http://knmg.artsennet.nl/Publicaties/KNMGpublicatie/Nontherapeutic-circumcision-of-male-minors-2010.htm>.

14. E.g., *Deciding Whether or Not to Circumcise Your Son*, INTACT AMERICA, <http://intactamerica.org/resources/decision> (last visited Nov. 17, 2012); Dan Bollinger, *Position Paper on Neonatal Circumcision and Genital Integrity*, INT’L COAL. FOR GENITAL INTEGRITY 1, 1 (Sept. 24, 2007), <http://www.icgi.org/Downloads/ICGIoverview.pdf>; MOTHERS AGAINST CIRCUMCISION, <http://www.mothersagainstcirc.org/> (last visited Nov. 16, 2012); JEWS AGAINST CIRCUMCISION, <http://www.jewsagainstcircumcision.org>.

15. Darcia Navarez, *More Circumcision Myths You May Believe: Hygiene and STDs, Is Circumcision Cleaner and Healthier?*, PSYCHOLOGY TODAY (Sept. 13, 2011), <http://www.psychologytoday.com/blog/moral-landscapes/201109/more-circumcision-myths-you-may-believe-hygiene-and-stds> (claiming if boys could talk while being circumcised, they would be adamant opponents).

16. INTACT AMERICA, *supra* note 14.

17. *Id.*

18. *Id.*

19. Royal Dutch Med. Ass’n, *supra* note 13 (“There is no convincing evidence that circumcision is useful or necessary in terms of prevention or hygiene . . . KNMG is calling upon doctors to actively and insistently inform parents who are considering the procedure of the absence of medical benefits and the danger of complications.”).

20. Ross Povenmire, *Do Parents Have the Legal Authority to Consent to Surgical Amputation of Normal, Healthy Tissue in their Newborn Children?*, 7 AM. U. J. GENDER SOC. POL’Y & L. 87, 88 (1998).

21. Female Genital Mutilation 18 U.S.C. § 116 (2006).

themselves as adults.²² These opponents of circumcision can point to a June 2012 decision by a court in Cologne, Germany, which held that non-therapeutic circumcision for religious reasons is criminal assault.²³ The German court reasoned that circumcision causes grievous bodily harm,²⁴ and that boys have a fundamental right to genital integrity that supersedes their parents' religious rights.²⁵

Thus, a battle is unfolding in courts and legislatures²⁶ as to the legality of circumcision. Amidst all of the divisiveness and hyperbole, we need to ask, what are the relevant facts, legal issues, and what is the applicable law?

I. THE FACTS

A. Origins

Almost all mammals have foreskins.²⁷ The male and female genitalia, which are identical in early gestation,²⁸ have evolved to function together during sexual intercourse over sixty-five to one hundred million years.²⁹ Male and female circumcisions have been practiced for thousands of years,³⁰ usually for religious, cultural, and personal reasons.³¹ Male

22. See generally Povenmire, *supra* note 20, at 88.

23. *German Court Rules Circumcision is 'Bodily Harm'*, BBC NEWS EUROPE, June 26, 2012, <http://www.bbc.co.uk/news/world-europe-18604664>.

24. Nicholas Kulish, *German Ruling Against Circumcising Draws Criticism*, N.Y. TIMES, June 26, 2012, <http://www.nytimes.com/2012/06/27/world/europe/german-court-rules-against-circumcising-boys.html>.

25. BBC, *supra* note 23.

26. See Religious and Parental Rights Defense Act of 2011, H.R. 2400, 112th Cong. (2011) (prohibiting states from adopting any law or regulation restricting a parent's right to circumcise their male children). MGMBill.Org sent a proposed bill to Congress and fifteen states that would extend the same protection to boys from genital cutting as girls enjoy. *State MGM Bills*, MGMBILL.ORG, <http://mgmbill.org/statemgmbills.htm> (last visited Feb. 6, 2013); *US MGM Bill*, MGMBILL.ORG, <http://mgmbill.org/usmgmbill.htm> (last visited Feb. 6, 2013). Currently, it has not been sponsored by any member of Congress. *US MGM Bill Status*, MGMBILL.ORG, <http://www.mgmbill.org/usmgmbillstatus.htm> (last visited Feb. 6, 2013).

27. See *History and Biology: Evolutionary Perspectives on the Foreskin*, HISTORY OF CIRCUMCISION, <http://www.historyofcircumcision.net/index.php?option=content&task=view&id=15> (last visited Feb. 6, 2013).

28. Steve Scott, *The Anatomy and Physiology of the Human Prepuce*, MALE AND FEMALE CIRCUMCISION: MEDICAL, LEGAL, AND ETHICAL CONSIDERATIONS IN PEDIATRIC PRACTICE 9–10 (George C. Denniston et al. eds., 1999).

29. C.J. Cold & J.R. Taylor, *The Prepuce*, 83 BRIT. J. UROLOGY 34, 34 (Supp. 1 1999).

30. W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 BRIT. J. UROLOGY 1, 1 (Supp. 1 1999) (stating that circumcision was customary in Egypt several thousand years before 2300 BCE).

31. See, e.g., AM. MED. ASS'N, CSA REP. 10, I-99, 17 (1999), available at www.cirp.org/library/statements/ama2000/ (“[P]arental decision-making [about circumcision] is based on social or cultural expectations, rather than medical concerns.”).

circumcision has been performed as a religious ritual,³² a painful obligatory rite of passage,³³ to mark or brand slaves and members of religious or tribal groups,³⁴ and to suppress sexuality.³⁵ American physicians introduced the practice in the late 1800s in an unsuccessful effort to prevent masturbation.³⁶ For the following century, American physicians claimed that circumcision prevented or cured a long list of diseases such as epilepsy, paralysis, hip-joint disease, bad digestion, inflammation of the bladder, and tuberculosis; in fact, an uncircumcised penis was “seen as the cause of most human diseases and socially unacceptable behaviours.”³⁷

B. Medical Opinion

A large number of medical associations decline to recommend circumcision.³⁸ In 1971, the American Academy of Pediatrics (“AAP”) stated there was no valid medical rationale for routine neonatal circumcision.³⁹ In its 1999 policy report, reaffirmed in 2005,⁴⁰ the AAP stated: “Existing scientific evidence demonstrates potential medical benefits of newborn male circumcision; however, these data not sufficient to recommend routine neonatal circumcision.”⁴¹ Even in its comparatively pro-circumcision statement in 2012, the Academy did not recommend circumcision.⁴² Some foreign medical associations also actively discourage the practice.⁴³

32. Dunsmuir & Gordon, *supra* note 30, at 1-2.

33. *Id.* at 1.

34. *Id.*

35. M. Fox & M. Thomson, *A Covenant with the Status Quo? Male Circumcision and the New BMA Guidance to Doctors*, 31 J. MED. ETHICS 463, 464 (2005) (“Significantly, both male and female circumcision were justified in terms of managing sexuality.”).

36. *Id.*

37. See MALE AND FEMALE CIRCUMCISION 39–42, 259 (George C. Denniston et al. eds. 1999); *Position Paper on Neonatal Circumcision and Genital Integrity*, INT’L COALITION FOR GENITAL INTEGRITY 1, 1 (Sept. 28, 2007), <http://www.icgi.org/Downloads/ICGIoverview.pdf>; see also Fox & Thomson, *supra* note 35.

38. See *Circumcision: Medical Organization Official Policy Statement*, CIRCUMCISION INFO. AND RESOURCE PAGES, <http://www.cirp.org/library/statements/> (last visited Nov. 15, 2012) (listing “official policy statements of various medical organizations regarding non-therapeutic male circumcision;” none of the policy statements in the CIRP.Org library recommends non-therapeutic child circumcision.).

39. See Ellen Shapiro, *American Academy of Pediatrics Policy Statements*, 1 REVIEWS IN UROLOGY 154, 154 (1999), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1477524>.

40. AAP *Publications Retired and Reaffirmed*, AM. ACAD. PEDIATRICS, <http://pediatrics.aappublications.org/content/116/3/796.full> (last visited Nov. 20, 2012).

41. Am. Acad. of Pediatrics, *Circumcision Policy Statement*, 103 PEDIATRICS, no. 9, 1999, at 686, available at <http://pediatrics.aappublications.org/content/103/3/686.full>.

42. *Id.*

43. See, e.g., E. Outerbridge, *Neonatal Circumcision Revisited*, 154 CAN. MED. ASSOC. J., no. 6, 1996, at 769–80, available at <http://www.cps.ca/en/documents/position/circumcision> (last visited Nov. 15,

C. Parental Consent

Although the national American medical associations have never recommended non-therapeutic circumcision, since 1971 they have continuously asserted that parents have the right to make the circumcision decision for religious, cultural, or personal reasons⁴⁴ (which is to say for any reason). Some American physicians may solicit consent to the circumcision operation from vulnerable⁴⁵ and usually uninformed parents.⁴⁶ They sometimes badger and pressure parents to give their consent.⁴⁷ Some American physicians recommend circumcision even though their medical associations do not.⁴⁸ In soliciting circumcision, doctors may mention cancer, sexually transmitted diseases, and HIV to parents,⁴⁹ may claim that circumcision has medical benefits,⁵⁰ or tell parents that it is legitimate for

2012) (“[The Canadian Paediatric Society] does not support recommending circumcision as a routine procedure for newborns”); ROYAL DUTCH MEDICAL ASSOCIATION, NON-THERAPEUTIC CIRCUMCISION OF MALE MINORS (2010), <http://knmg.artsennet.nl/Publicaties/KNMGpublicatie/Nontherapeutic-circumcision-of-male-minors-2010.htm> (last visited Nov. 15, 2012) (“KNMG is therefore urging a strong policy of deterrence. KNMG is calling upon doctors to actively and insistently inform parents who are considering the procedure of the absence of medical benefits and the danger of complications. Non-therapeutic circumcision of male minors conflicts with the child’s right to autonomy and physical integrity.”).

44. See *Male Circumcision*, *supra* note 2, at e756 (“Parents should weigh the health benefits and risks in light of their own religious, cultural, and personal preferences, as the medical benefits alone may not outweigh these other considerations for individual families.”).

45. See, e.g., Kennedy, *supra* note 11 (recounting how, in 2003, William Stowell settled a lawsuit arising from a properly performed circumcision in part by claiming that it was unlawful for the physician to solicit consent from his mother while she was under the influence of anesthesia).

46. See, e.g., Mark Jenkins, *Separated At Birth: Did Circumcision Ruin Your Sex Life?*, MEN’S HEALTH, July/Aug. 1998, 130, available at <http://www.noharmm.org/separated.htm> (“Most parents don’t know what circumcision really is, and yet 65 percent of them still allow doctors to do the surgery.”).

47. A woman reports that her brother was circumcised in a Canadian hospital without consent. When she herself was pregnant, and after the birth of her son, she was “constantly pressured” by physicians, midwives, an ultra-stenographer, her husband, and in-laws, to circumcise him. Physicians gave her many arguments (e.g., so he would look like the father, reduce risk of UTIs, improve sex). The pressure was so great that she marked his card “Do not Circ” and left the hospital one day early out of fear that the hospital might circumcise him anyway. She states, “I met a neighbor who was as against circ as I was and had relented to [the] pressure and they cut the tip of her son’s penis off!” Email from Annette B. of Elmira, New York, to the writer (October 20, 2012) (on file with author).

48. See, e.g., Jonathan Freedman, *Doctors’ Circumcision Recommendations Influenced by Personal Factors, Study Finds*, INTACTNEWS (Oct. 16, 2011, 11:52 PM), <http://intactnews.org/node/135/1318823579/doctors039-circumcision-recommendations-influenced-personal-factors-study-finds>.

49. See, e.g., *Circumcision*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/labornbirth/circumcision.html> (last visited Nov. 15, 2012) (mentioning cancer prevention and reduced risk of sexually transmitted diseases as benefits of circumcision).

50. See, e.g., *Where We Stand: Circumcision*, HEALTHYCHILDREN.ORG, <http://www.healthychildren.org/English/ages-stages/prenatal/decisions-to-make/Pages/Where-We->

them to make the circumcision decision for religious, cultural, and personal reasons.⁵¹ Physicians may not mention any risks, and if they do, they may take the same position as the AAP: that the risks are very low.⁵² After obtaining parental consent, American physicians circumcise more than one million American boys each year, usually within one to two days of their birth.⁵³ The best predictor of whether a given boy will be circumcised is the circumcision status of his father.⁵⁴

D. The Surgery

American medical associations have stated that neonatal circumcision is elective, non-therapeutic surgery.⁵⁵ It is irreversible surgery⁵⁶ that removes approximately one-half of the covering of the penis.⁵⁷ Newborn boys must first be immobilized on a board.⁵⁸ The surgery is invasive.⁵⁹ The foreskin is fused to the glans penis at birth, and that the two must be forced apart.⁶⁰ Then a clamp may be used or a device attached to stop blood flow to the foreskin until it dies.⁶¹ These clamps have been blamed for serious injuries.⁶² Throughout the first half of the twentieth century, the prevailing medical opinion was that infants do not feel pain, or not to the same degree as adults, and operations on children without anesthesia were

Stand-Circumcision.aspx (last visited Nov. 15, 2012) (claiming undefined medical benefits from circumcision).

51. *Circumcision Policy Statement*, *supra* note 41; American Academy of Family Physicians, *Position Paper on Neonatal Circumcision*, CIRCUMCISION INFO. & RESOURCE PAGES (2002) <http://www.cirp.org/library/statements/aafp2002/>.

52. *Circumcision Policy Statement*, *supra* note 41.

53. *Circumcision, the Ultimate Parenting Dilemma*, BBC, <http://www.bbc.co.uk/news/magazine-19072761> (last visited Nov. 15, 2012) (“Three-quarters of American adult men are circumcised. There are over one million procedures each year, or around one every 30 seconds.”).

54. Mark S. Brown & Cheryl A. Brown, *Circumcision Decision: Prominence of Social Concerns*, 80 PEDIATRICS, no. 2, 1987, at 215–19, <http://pediatrics.aappublications.org/content/80/2/215.abstract>.

55. AM. MED. ASS’N, NEONATAL CIRCUMCISION (2000), available at <http://www.cirp.org/library/statements/ama2000>.

56. BRITISH MEDICAL ASSOC., THE LAW AND ETHICS OF MALE CIRCUMCISION – GUIDANCE FOR DOCTORS (2003), available at <http://www.cirp.org/library/statements/bma2003/>.

57. T. Hammond, *A Preliminary Poll of Men Circumcised in Infancy or Childhood*, 83 BJU INT’L, Supp. 1, at 85, 86 (1999), available at <http://onlinelibrary.wiley.com/doi/10.1046/j.1464-410x.1999.0830s1085.x/pdf>.

58. *The Facts Behind Circumcision*, INTACT AMERICA, <http://intactamerica.org/learnmore> (last visited Feb. 13, 2013).

59. *Id.*

60. *Id.*

61. See Stephanie Pappas, *5 Things You Didn’t Know About Circumcision*, DISCOVERY NEWS (Aug. 27, 2012, 3:00 AM), <http://news.discovery.com/human/circumcision-facts-120827.html>.

62. See, e.g., *Injuries Linked to Circumcision Clamps*, LOS ANGELES TIMES (Sept. 26, 2011), available at <http://articles.latimes.com/2011/sep/26/health/la-he-circumcision-20110926>.

commonplace;⁶³ in 1999, however, some American medical associations stated that neonatal circumcision is painful and that anesthesia should be used.⁶⁴ At that time, however, only forty-five percent of physicians were using anesthesia;⁶⁵ additionally, anesthesia may be ineffective.⁶⁶ Boys scream, try to escape, their heart rates, blood pressure, and cortisol levels (stress indicators) rise markedly,⁶⁷ and they may perceive the experience to be terrifying.⁶⁸

E. Risks

Circumcision surgery carries a risk of many minor and major complications.⁶⁹ The only debate concerns the extent of the risk. The AAP calls the risk of serious complications very low, but it cites studies showing a complication rate of 3.1% in Atlanta and of 1.2% to 3.8% in European centers, and another study of 214 boys showing a 25.6% rate of adhesions, 20.1% risk of redundant prepuce, 15.5% risk of balanitis, 4.1% risk of skin bridge, and 0.5% risk of meatal stenosis.⁷⁰ The AAP later states,

63. Doris K. Cope, *Neonatal Pain: The Evolution of an Idea*, AM. ASS'N OF ANESTHESIOLOGISTS NEWSLETTER, September 1998, available at http://anestit.unipa.it/mirror/asa2/newsletters/1998/09_98/Neonatal_0998.html.

64. *Circumcision Policy Statement*, *supra* note 41 (“[T]here is considerable evidence that newborns who are circumcised without analgesia experience pain and physiologic stress”); Cynthia R. Howard et al., *Acetaminophen Analgesia in Neonatal Circumcision: The Effect on Pain*, 93 PEDIATRICS, no. 4, 1994 at 641–46, available at <http://pediatrics.aappublications.org/content/93/4/641.abstract>; see also B.R. Paix & S.E. Peterson, *Circumcision of Neonates and Children without Appropriate Anaesthesia is Unacceptable Practice*, 40 ANAESTH INTENSIVE CARE, no. 3, 2012 at 511–16, available at <http://www.ncbi.nlm.nih.gov/pubmed/22577918>.

65. NEONATAL CIRCUMCISION, *supra* note 55.

66. Janice Lander et al., *Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision*, 278 J. AM. MED. ASS'N, no. 24, 1997 at 2157, 2157 (finding that some forms of anesthesia provided relief of pain for only part of the circumcision procedure); Cold & Taylor, *supra* note 29, at 37–38.

67. *Circumcision Policy Statement*, *supra* note 41.

68. Paul M. Fleiss & Frederick M. Hodges, WHAT YOUR DOCTOR MAY NOT TELL YOU ABOUT CIRCUMCISION (“We know that circumcision is a terrifying, painful, and traumatic event.”).

69. N. Williams & L. Kapila, *Complications of Circumcision*, 80 BRIT. J. SURGERY 1231 (1993), available at <http://cirp.org/library/complications/williams-kapila/>; NEONATAL CIRCUMCISION, *supra* note 55. The American Medical Association lists the following complications and “untoward events” as potential side effects of circumcision:

Bleeding and infection, occasionally leading to sepsis, taking too much skin from the penile shaft causing denudation or rarely, concealed penis, or from not removing sufficient foreskin, producing an unsatisfactory cosmetic result or recurrent phimosis, formation of skin bridges between the penile shaft and glans, meatitis and meatal stenosis, chordee, inclusion cysts in the circumcision line, lymphedema, hypospadias and epispadias, and urinary retention. [Also] other rare but severe events including scalded skin syndrome, necrotizing fasciitis, sepsis and meningitis, urethrocuteaneous fistulas, necrosis (secondary to cauterization), and partial amputation of the glans penis.

NEONATAL CIRCUMCISION, *supra* note 55.

70. *Male Circumcision*, *supra* note 2.

inconsistently, that the risks are unknown: “[I]t is difficult, if not impossible, to adequately assess the total impact of complications, because the data are scant and inconsistent regarding the severity of complications.”⁷¹ If American medical associations do not know the risks that circumcisions pose to boys after so many years, they should.

In any event, risks include serious injuries, such as the loss of part or all of the penis.⁷² A significant percentage of visits to pediatric urology clinics are to repair or attempt to repair injuries caused by circumcision.⁷³ Research also suggests that more than one hundred American boys per year die from complications related to circumcision such as bleeding and infections.⁷⁴

F. Harm

Circumcision harms all boys and the men they will become. It cuts into and removes functional, living tissue, including thousands of nerve endings,⁷⁵ creates a wound, causes operative and post-operative pain, and interferes with feeding⁷⁶ and maternal bonding.⁷⁷ Circumcised boys show increased sensitivity to pain at six months of age, suggesting that the procedure has long-term effects on brain function.⁷⁸ The surgery leaves a scar,⁷⁹ irreversibly removes parts of the penis which normally function

71. *Id.* at e775.

72. N. Williams & L. Kapila, *Complications of Circumcision*, 80 BRIT. J. SURGERY 1231, 1232 (1993).

73. Aaron J. Krill et. al., *Complications of Circumcision*, 11 Sci. World. J. 2458, 2458 (2011); Rafael V. Pieretti et al., *Late Complications of Newborn Circumcision: A Common and Avoidable Problem*, PEDIATRIC SURGERY (Berlin), May 2010, <http://www.springerlink.com/content/9w834626551u8087/> (last visited Nov. 1, 2012) (explaining that at Massachusetts General Hospital between 2003 to 2007, 4.7% of operations on children and 7.4% of cases at a pediatric urology outpatient clinic resulted from complications from a previous neonatal circumcision; see also Michael Miller, *Couple Sues Doctor Over Botched Circumcision That Left Son's Penis "Unsightly"*, MIAMI NEW TIMES, May 23, 2012, available at http://blogs.miaminewtimes.com/riptide/2012/05/couple_sues_miami_doctor_over.php (stating that corrective surgery could not correct the mistake). Complications from circumcision include penile adhesions, skin bridges, meatal stenosis, redundant foreskin, buried penis and penile rotation. I.O.W. Leitch, *Circumcision - A Continuing Enigma*, 6 AUST. PAEDIATRIC. J. 59 (stating that 8.5% of circumcisions are recircumcisions); *The Case Against Neonatal Circumcision*, 6172 BRIT. MED. J. 1163, 1163 (1979) (stating that as many as 10% of babies require a second circumcision).

74. Dan Bollinger, *Lost Boys: An Estimate of U.S. Circumcision-Related Infant Deaths*, 4 THYMOS: J. OF BOYHOOD STUD. 78, 83 (2010). The 2012 AAP Report does not mention this study.

75. See Cold & Taylor, *supra* note 29, at 41.

76. Comm. on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *The Assessment and Management of Acute Pain in Infants, Children, and Adolescents*, 108 PEDIATRICS 793, 794 (2001), available at <http://pediatrics.aappublications.org/content/108/3/793.full.html>.

77. *Circumcision vs. Child Health, Breastfeeding and Maternal Bonding*, CIRCUMCISION INFO. & RESOURCE PAGES (Dec. 30, 2007), <http://www.cirp.org/library/birth/>.

78. Anna Taddio et al., *Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination*, 349 LANCET 599, 602 (1997).

79. Cold & Taylor, *supra* note 29, at 41.

together,⁸⁰ dramatically changes its appearance,⁸¹ causes the penis to hang at a greater angle,⁸² and causes the glans to become calloused over time.⁸³ Some scholars claim that circumcision can also cause post-traumatic stress syndrome.⁸⁴

Circumcision also changes and impairs men's sex lives.⁸⁵ As the AAP acknowledged in 1999, it changes sexual behavior.⁸⁶ The removal of the foreskin also indisputably prevents normal sexual function.⁸⁷ In the intact male, the highly elastic foreskin, a moist and sensitive mucous membrane like lips and eyelids,⁸⁸ moves freely back and forth in a virtually frictionless gliding action.⁸⁹ The foreskin, consisting of several parts, such as the dartos muscle, ridged band, and frenulum, which function together, is replete with blood vessels and specialized nerve endings including stretch receptors.⁹⁰ Research shows that the foreskin is the most sensitive part of the penis.⁹¹ Some men also report that the surgery leaves insufficient skin

80. *Id.* at 34.

81. *See id.* at 41.

82. *Id.*

83. *Id.*

84. RONALD F. GOLDMAN, CIRCUMCISION: THE HIDDEN TRAUMA (1997); Taddio et al., *supra* note 78 ("infants circumcised without anaesthesia may represent an infant analogue of a post-traumatic stress disorder triggered by a traumatic and painful event.").

85. Morten Frisch et al., *Male Circumcision and Sexual Function in Men and Women: A Survey-Based, Cross-Sectional Study in Denmark*, 40 INT'L J. EPIDEMIOLOGY, 1367, 1375 (2011).

86. *Male Circumcision*, *supra* note 41 (suggesting more varied sexual practice among uncircumcised adult males); Cold & Taylor, *supra* note 29, at 41 ("The increased frequency of masturbation, anal intercourse and fellatio reported by circumcised men in the USA may possibly be due to the sensory imbalance caused by circumcision."). *But see* Edward O. Laumann et al., *Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice*, 277 JAMA, no. 13, 1997, at 1052, 1054 (indicating that uncircumcised men tend to display a slightly greater percentage of sexual dysfunction).

87. Frisch, *supra* note 85; Cold & Taylor, *supra* note 29, at 41. *See also* *How the Foreskin Works*, CIRCUMCISION INFO. & RESOURCE PAGES, <http://www.circumstitions.com/Works.html> (last visited October 29, 2012) (providing an animated depiction of circumcision).

88. Cold & Taylor, *supra* note 29, at 34.

89. S. Lakshmanan & S. Prakash, *Human Prepuce: Some Aspects of Structure and Function*, 44 IND. J. SURGERY 134, 134-37 (1980), available at <http://www.cirp.org/library/anatomy/lakshmanan>; John P. Warren & Jim Bigelow, *The Case Against Circumcision*, BRIT. J. SEXUAL MED., SEPT.-OCT. 1994, at 6, 8.

90. *See generally* Cold & Taylor, *supra* note 29, at 34.

91. Morris L. Sorrells et al., *Fine-Touch Pressure Thresholds in the Adult Penis*, 99 BJU INT. 864, 864 (2007) ("The glans of the circumcised penis is less sensitive to fine touch than the glans of the uncircumcised penis. The transitional region from the external to the internal prepuce is the most sensitive region of the uncircumcised penis and more sensitive than the most sensitive region of the circumcised penis. Circumcision ablates [removes] the most sensitive parts of the penis."); Cold & Taylor, *supra* note 29, at 41. ("The prepuce is primary, erogenous tissue necessary for normal sexual function."). A 2013 study also found that male circumcision decreases penile sensitivity. *See generally* Guy A. Bronselaer et al., *Male Circumcision Decreases Penile Sensitivity as Measured in a Large*

and mucosa for a comfortable erection.⁹² Thus, circumcision may reduce sexual pleasure for men, and also for their for female partners, which in turn may impair relationships.⁹³ The complete extent of the harm that circumcision causes remains unknown.⁹⁴ Increasing numbers of boys and men are angry at both physicians and their parents for having circumcised them without their consent,⁹⁵ and have foreskin envy.⁹⁶ Even though circumcision is common in America, intact men here rarely choose it for themselves.⁹⁷

G. Benefits

In 1999, the American Medical Association stated that circumcision has *potential* medical benefits, specifically a reduction in the risk of infant urinary tract infections, penile cancer in adult males, and possibly certain sexually transmissible diseases (“STDs”), including the human immunodeficiency virus (“HIV”).⁹⁸ Despite these possible benefits, the AMA concluded that the “data are not sufficient to recommend routine neonatal circumcision.”⁹⁹ It reasoned that urinary tract infections in uncircumcised males and penile cancer are rare.¹⁰⁰ As to STDs, the AMA stated, “behavioral factors are far more important risk factors for acquisition of HIV and other sexually transmissible diseases than circumcision status, and *circumcision cannot be responsibly viewed as ‘protecting’ against such infections.*”¹⁰¹ In its 2012 circumcision report,

Cohort, BJU INT’L, Feb. 2013.

92. Hammond, *supra* note 57, at 87.

93. Frisch et. al., *supra* note 85.

94. W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 BRIT. J. UROLOGY INT’L, Supp. 1, at 1 (1999) (“[D]espite the billions of foreskins that have been severed over thousands of years, it is only recently that efforts have been made to understand the prepuce.”); *see also* David Gisselquist & Joseph Sonnabend, *Have We Ignored a Very Simple Procedure That Could Significantly Reduce the Risk of Heterosexual Transmission of HIV to Men?*, AIDS PERSPECTIVE (May 8, 2012), <http://aidsperspective.net/blog/?p=860> (describing a study that, surprisingly, shows that uncircumcised men who washed their genitals within ten minutes of sexual intercourse are more likely to contract HIV.).

95. Taddio et al., *supra* note 98, at 602 (“infants circumcised without anaesthesia may represent an infant analogue of a post-traumatic stress disorder triggered by a traumatic and painful event.”).

96. *See* Richard Hyfler, *Circumcision: You Can’t Have It Both Ways*, FORBES, <http://www.forbes.com/sites/richardhyfler/2011/05/26/circumcision-you-cant-have-it-both-ways/> (last viewed November 1, 2012) (referring to foreskin envy and stating that an estimated one-quarter million men worldwide are attempting to restore their foreskins to the extent possible, though some parts are irrevocably lost); Personal communication from Ronald Low (August 6, 2012).

97. EDWARD WALLERSTEIN, *CIRCUMCISION: AN AMERICAN HEALTH FALLACY* 128 (1980) (estimated that three men per 1,000 in the United States undergo circumcision after infancy).

98. AM. MED. ASS’N, *supra* note 31.

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

however, the American Academy of Pediatrics (“AAP”) asserts that the “health benefits of newborn male circumcision [no longer ‘potential benefits’] outweigh the risks.”¹⁰² In its *Circumcision Speaking Points* for members, however, the AAP states that the health benefits of circumcision include a lower *risk* of various diseases.¹⁰³ Thus, in its 2012 circumcision report, the AAP is now claiming as actual benefits what it concedes are still only *potential* benefits or slightly reduced risks.

The truth is that infants and boys rarely if ever benefit from circumcision. They will not be at risk of STDs for many years. It is contested whether circumcision reduces the risk of urinary tract infections or penile cancer.¹⁰⁴ Even if it does, it would be necessary to circumcise between 100 and 200 boys to prevent one case of urinary tract infection,¹⁰⁵ which could be treated easily and safely with oral antibiotics.¹⁰⁶ Also, physicians do not perform preemptive genital surgery on girls to reduce the risk of urinary tract infections. Finally, circumcision may cause more infections than it prevents.¹⁰⁷

Men also rarely benefit from circumcision. For example, even if circumcision reduces the risk of penile cancer, which is debated,¹⁰⁸ penile cancer is a rare disease in America that generally occurs in old age and is often a byproduct of poor hygiene,¹⁰⁹ in contrast to breast cancer in women, which is many times more common and occurs at a younger age.¹¹⁰ In addition, penile cancer may be prevented by washing and not smoking.¹¹¹

102. Am. Acad. of Pediatrics, *Circumcision Policy Statement*, 103 PEDIATRICS, no. 3, 2012, at 585, available at <http://pediatrics.aappublications.org/content/130/3/585.full.pdf+html>.

103. *Newborn Male Circumcision*, AM. ACAD. OF PEDIATRICS (Aug. 27, 2012).

104. AM. MED. ASS’N, *supra* note 31.

105. *Id.*

106. Alejandro Hoberman et al., *Oral Versus Initial Intravenous Therapy for Urinary Tract Infections in Young Febrile Children*, 104 PEDIATRICS, no. 1, 1999, at 79; George H. McCracken, *Options in Antimicrobial Management of Urinary Tract Infections in Infants and Children*, 8 PEDIATRIC INFECTIOUS DISEASE J., no. 8, 1989, at 552, 553.

107. Herman A. Cohen et al., *Postcircumcision Urinary Tract Infection*, 31 CLINICAL PEDIATRICS, no. 6, 1992 at 322, 324; Task Force on Circumcision, American Academy of Pediatrics, *supra* note 49, at 687 (“[c]ircumcised infant boys had a significantly higher risk of penile problems (such as meatitis) than did uncircumcised boys.”); Dario Prais et al., *Is Ritual Circumcision a Risk Factor for Neonatal Urinary Tract Infections?*, 94 ARCHIVES OF DISEASE IN CHILDHOOD 191, 194 (2009); Jacob Amir et al., *Circumcision and Urinary Tract Infection in Infants*, 140 AM. J. DISEASES IN CHILDREN 1092, 1092 (1986).

108. Am. Acad. of Pediatrics, *supra* note 41, at 690.

109. Gustavo C. Guimarães et al., *Penile Cancer: Epidemiology and Treatment*, 13 CURRENT ONCOLOGY REP. 231, 231 (2011).

110. *Compare* Am. Acad. of Pediatrics, *supra* note 41, at 690, with *Breast Cancer Risk in American*

A few studies suggest that circumcision reduces the risk of STDs, but they have been criticized as flawed.¹¹² Other studies have found no effect,¹¹³ and several studies have found circumcised men may be at greater risk for sexually transmitted urethritis and chlamydial infection.¹¹⁴ Circumcision also does not prevent HIV and AIDS, which are more common in the United States, where a high percentage of men have been circumcised, than in Europe, where circumcision is relatively rare.¹¹⁵ Three African studies suggest that circumcision may reduce the risk of African men contracting HIV during unprotected sex with infected female partners by up to 60%, but this is only a 1.3% absolute reduction, and only during the period of a short study.¹¹⁶ Moreover, the validity of these findings has been challenged.¹¹⁷ The operation may actually *increase* HIV infections,¹¹⁸ and it also may increase the absolute risk of HIV transmission from infected, circumcised men to their female partners by 61%.¹¹⁹ In America, sexually active men must still practice safe sex to avoid STDs,¹²⁰ and so long as they do, circumcision does not confer any additional benefit.¹²¹

Women, NAT'L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/detection/probability-breast-cancer>.

111. M.C.G. Bleeker et al., *Penile Cancer: Epidemiology, Pathogenesis and Prevention*, 27 WORLD J. UROLOGY 141, 147–48 (2009).

112. Gregory J. Boyle & George Hill, *Sub-Saharan African Randomised Clinical Trials Into Male Circumcision and HIV Transmission: Methodological, Ethical and Legal Concerns*, 19 J.L. & MED. 316, 317 (2011). African men who are circumcised may also mistakenly believe that circumcision prevents HIV. *Id.* at 328.

113. See, e.g., Edward O. Laumann et al., *Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice*, 277 J. OF THE AM. MED. ASSOC., no. 13, 1997 at 1052, 1052 (“We find no significant differences between circumcised and uncircumcised men in their likelihood of contracting sexually transmitted diseases.”).

114. See, e.g., Robert S. Van Howe, *Genital Ulcerative Disease and Sexually Transmitted Urethritis and Circumcision: A Meta-Analysis*, 18 INT'L J. OF STD & AIDS 799, 804–06 (2007).

115. See Ali A. Rizvi, *Male Circumcision and the HIV/AIDS Myth*, HUFFINGTON POST (Aug. 3, 2009, 04:16 PM), http://www.huffingtonpost.com/ali-a-rizvi/male-circumcision-and-the_b_249728.html.

116. Boyle & Hill, *supra* note 112, at 316, 326.

117. *Id.* at 326–27.

118. Robert S. Van Howe & Michelle R. Storms, *How the Circumcision Solution in Africa Will Increase HIV Infections*, 2 J. PUB. HEALTH AFR. 11 (2011).

119. Boyle & Hill, *supra* note 112, at 317.

120. Boyle & Hill, *supra* note 112, at 330–331; see also AM. MED. ASS'N, *supra* note 31 (“behavioral factors appear to be far more important risk factors in the acquisition of HIV infection than circumcision status, and circumcision cannot be responsibly viewed as ‘protecting’ against such infections”).

121. Boyle & Hill, *supra* note 112, at 331.

H. Profits

Circumcision is uncommon in many parts of the world.¹²² Outside the United States, it is usually performed for religious reasons,¹²³ and rarely on infants, who are more vulnerable than young men,¹²⁴ except in America,¹²⁵ Israel,¹²⁶ and South Korea.¹²⁷ As stated, many foreign medical associations have stated that circumcision has little medical value and should be deterred.¹²⁸ Outside the United States, some governments have stopped paying for it.¹²⁹ In America, by contrast, circumcision is a highly profitable,¹³⁰ vertically integrated business, in which physicians and hospitals charge for the procedure, and the government has funded it through the Medicaid program since 1965.¹³¹ In addition, foreskins are sometimes sold to pharmaceutical and cosmetics companies.¹³²

II. LEGAL ISSUES

The fact that circumcision is commonplace, asserted by proponents of circumcision in legal briefs,¹³³ is not in and of itself a valid legal argument. Slavery was once commonplace,¹³⁴ as was drilling holes in the brain to cure

122. See Helen Weiss et al., *Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability*, WORLD HEALTH ORGANIZATION (2007), http://apps.who.int/iris/bitstream/10665/43749/1/9789241596169_eng.pdf.

123. D.S. Kim et al., *Male Circumcision: A South Korean Perspective*, 83 BRIT. J. UROLOGY INT'L, Supp. 1, 1999, at 28.

124. Am. Acad. of Pediatrics, *supra* note 41, at 686.

125. See Weiss, *supra* note 122, at 1.

126. *Id.*

127. Kim et al., *supra* note 144, at 28; see also Weiss, *supra* note 122, at 8–9.

128. See, e.g., Royal Dutch Med. Assoc., *Non-Therapeutic Circumcision of Male Minors* 4 (2010).

129. Matthew R. Giannetti, *Circumcision and the American Academy of Pediatrics: Should Scientific Misconduct Result in Trade Association Liability?*, 85 IOWA L. REV. 1507, 1510 (2000).

130. Paul M. Fleiss, *The Case Against Circumcision*, MOTHERING: THE MAGAZINE OF NATURAL FAMILY LIVING, Winter 1997, at 36–45, available at <http://www.cirp.org/news/Mothering1997/>; see also Am. Acad. of Pediatrics, *supra* note 41, at 686.

131. Robert S. Van Howe, *A Cost-Utility Analysis of Neonatal Circumcision*, 24 MED. DECISION MAKING 584, 585 (Nov.–Dec. 2004).

132. See e.g., LORI ANDREWS & DOROTHY NELKIN, *BODY BAZAAR: THE MARKET FOR HUMAN TISSUE IN THE BIOTECHNOLOGY AGE* 2 (2001) (noting that pieces of people are used in a variety of ways, including the use of infant foreskin removed in circumcisions.). A book review of *Body Bazaar*, written by Elizabeth Whelan, states, “Andrews and Nelkin make it clear that body parts from the living and the dead are gold mines for pharmaceutical development.” Elizabeth Whelan, *Biomedical Prostitution?*, 17 INSIGHT ON THE NEWS, issue 20, 2001, at p. 27; see also *The Skinny on Miracle Wrinkle Cream*, INFINITE UNKNOWN (2009), <http://www.infiniteunknown.net/2008/02/20/the-skinny-on-miracle-wrinkle-cream/>.

133. Brief for Petitioner at 7, *Boldt v. Boldt*, 555 U.S. 814 (2008) (No. 07-1348) 2008 WL 1866959, at *7.

134. See *Prigg v. Pennsylvania*, 41 U.S. 539, 594 (1842).

epilepsy and mental disorders,¹³⁵ the use of leeches to remove blood,¹³⁶ and the use of unsterile instruments in surgery.¹³⁷ In addition, even if circumcision has potential or actual medical benefits (which is debated), it does not necessarily follow that it is a legal practice. Removing any body part, if removed to prevent it from becoming diseased, would be medically beneficial, yet this would not justify amputating a leg, for example, to prevent an infection that could be treated with antibiotics. Physicians do not routinely remove healthy body parts from children other than the male foreskin.¹³⁸ The fact that there is legislation against cutting girls' genitals¹³⁹ but not boys' genitals also does not resolve whether or not male circumcision is legal.¹⁴⁰ As legal scholars have noted, he who avers must prove;¹⁴¹ thus, physicians who circumcise have the burden of proving that the surgery is legal.¹⁴²

Circumcision raises one principal issue for its opponents: do boys, like girls, have a right to genital integrity, and, if so, where is the right found? The surgery raises many troublesome legal issues for proponents. Is invasive surgery on boys' genitals legal when cutting girls' genitals is a federal crime?¹⁴³ How can it be legal to remove boys' foreskins to reduce the risk of penile cancer,¹⁴⁴ but not girls' breasts, which are many times more likely to become cancerous?¹⁴⁵ Can physicians lawfully endanger and harm boys without benefiting most of them? Do physicians have the right

135. Charles G. Gross, *A Hole in the Head*, 5 THE NEUROSCIENTIST, no. 4, 1999, at 265–68, available at http://www.princeton.edu/~cggross/neuroscientist_99_hole.pdf.

136. *Leech Therapy*, BLOODY SUCKERS, <http://www.pbs.org/wnet/nature/bloodysuckers/leech.html> (last visited Feb. 27, 2013). But see Rita Rubin, *Maggots and Leeches: Good Medicine*, USA TODAY (July 7, 2004, 11:46 PM), http://usatoday30.usatoday.com/news/health/2004-07-07-leeches-maggots_x.htm.

137. HISTORY OF ASEPTIC TECHNIQUE, <http://jace.myweb.uga.edu/MiboWebsite/MiboWebHist.htm> (last visited Nov. 26, 2012).

138. Tom Gualtieri, *Our Bodies, Our Choice Part I*, THE WEEKLINGS (Aug. 31, 2012), <http://www.theweeklings.com/tgualtieri/2012/08/31/our-bodies-our-choices-part-i/>.

139. Female Genital Mutilation, 18 U.S.C. § 116 (2006).

140. In banning female genital mutilation, Congress made findings that such mutilation violates federal and state statutory and constitutional law. *Id.*

141. *Equity Aviation Services (Pty) Ltd v. SA Transport & Allied Workers Union & Others*, 30 INDUS. L.J. 1997, 2043 (2009).

142. Brief Submitted to the Law Commission of England and Wales, Christopher Price, *Male Circumcision: A Legal Affront* § 1.1 (December 1996), available at <http://www.cirp.org/library/legal/price-uklc/>.

143. 18 U.S.C. § 116.

144. *Penile Cancer*, AM. CANCER SOCIETY, <http://www.cancer.org/acs/groups/cid/documents/webcontent/003132-pdf.pdf>.

145. *Id.*; *Breast Cancer*, AMERICAN CANCER SOC'Y, <http://www.cancer.org/acs/groups/cid/documents/webcontent/003090-pdf.pdf>.

to operate on healthy boys, against their own recommendation,¹⁴⁶ at the request of parents for reasons having nothing to do with medicine,¹⁴⁷ usually without fully informing parents of the risks?¹⁴⁸ Is it lawful to circumcise healthy boys when intact men rarely choose it for themselves?¹⁴⁹ Do parents have the right to make the circumcision decision for religious reasons or any reason? To summarize these issues and the analysis to follow:

1. Do boys have a legal right to genital integrity? If not,
2. Do physicians have the legal right to circumcise healthy boys? If so,
3. Do parents have the legal authority to make the circumcision decision? If so,
4. Is it lawful to use Medicaid to pay for circumcision, for companies to buy and sell foreskins, and for trade associations to be held liable for circumcision?

III. THE LAW

A. Do Boys Have a Right to Genital Integrity?

The question should be stated more broadly: does every American citizen – whether young or old, male or female – have a right to personal security or bodily integrity and hence to genital integrity? If boys do not, adults and girls do not, either. Congress stated in banning non-therapeutic female genital cutting that it “infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional.”¹⁵⁰ That is to say, cutting girls’ genitals already violated many federal and state statutes and constitutions. What are those laws?

1. The Common Law

In 1791, the United States passed a constitutional amendment that adopted British common law.¹⁵¹ The first chapter of Blackstone’s

146. Am. Acad. of Pediatrics, *supra* note 41, 691.

147. *Circumcision*, HEALTHY CHILDREN.ORG, <http://www.healthychildren.org/English/ages-stages/prenatal/decisions-to-make/pages/Circumcision.aspx> (last visited Nov. 15, 2012).

148. *Are You Fully Informed?*, PEACEFUL PARENTING (Jan. 1, 2008) <http://www.drmmomma.org/2010/01/are-you-fully-informed.html>.

149. Rob Jordan, *Adult Circumcision: Cutting the Rate of HIV Transmission*, AM. ASS’N. MED. ASSISTANTS (Mar.–

Apr. 2009), <http://www.aama-ntl.org/CMAToday/archives/quickclinic/details.aspx?ArticleID=645>.

150. 18 U.S.C. § 116.

151. See Jeffrey D. Jackson, *Blackstone’s Ninth Amendment: A Historical Common Law Baseline of the*

Commentaries, “Of the Absolute Rights of Persons,” states that the rights of the people are to be preserved inviolate.¹⁵²

a. The Right to Personal Security

The principal purpose of the law, Blackstone wrote, is to protect the right of all people to personal security:

1. The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health... 2. [Man’s rights] include a prohibition not only of killing, and maiming, but also of torturing... and... no man shall be forejudged of life or limb contrary to... the law of the land.... 3. [A man’s] person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member. 4. The preservation of a man’s health from such practices as may prejudice or annoy it.¹⁵³

The U.S. Supreme Court acknowledged this concept in 1997, citing the Magna Carta: “Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security.”¹⁵⁴ Circumcision interrupts a boy’s and a man’s enjoyment of his limbs, body, and health, maims and wounds him,¹⁵⁵ and violates his common law right to personal security.

b. The Right to Liberty

After discussing personal security, Blackstone wrote that the law of England preserved the personal liberty of individuals:

The absolute rights of man... [include the] power of choosing those measures which appear to him to be most desirable... This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control.”¹⁵⁶

Interpretation of Unenumerated Rights, 62 OKLA. L. REV. 167, 183 (2010).

152. U.S. CONST. amend. IX (“[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); 1 WILLIAM BLACKSTONE, COMMENTARIES *129. See generally Jackson, *supra* note 151.

153. 1 WILLIAM BLACKSTONE, COMMENTARIES *129, *133–34.

154. *Ingraham v. Wright*, 430 U.S. 651, 673 (1997) (citing Magna Carta Art. 39; 1 WILLIAM BLACKSTONE, COMMENTARIES, *134).

155. DaiSik King & Myung-Geol Pang, *The Effect of Male Circumcision on Sexuality*, 99 B.J.U. INT’L 619, 622 (2006).

156. 1 WILLIAM BLACKSTONE, COMMENTARIES *121, *125.

In 1891, the Supreme Court in *Union Pacific Railway Company v. Botsford* affirmed the paramount importance of freedom and personal security as derived from the common law:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.... “The right to one’s person may be said to be a right of complete immunity; to be let alone.”¹⁵⁷

Circumcision violates a boy’s right to be let alone, free from interference, and to control his own person in the future. These fundamental common law rights to personal security and liberty became enshrined in the Declaration of Independence¹⁵⁸ and, as discussed below, in the United States Constitution¹⁵⁹ and state constitutions¹⁶⁰ and numerous other provisions of law.

2. Constitutional Law

The Bill of Rights to the United States Constitution was adopted to protect individuals.¹⁶¹ As the Supreme Court has stated, “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”¹⁶² Constitutional rights are “fundamental” and “may not be submitted to vote.”¹⁶³ Accordingly, legislation that violates constitutional rights is legally invalid.¹⁶⁴ Since Congress found non-therapeutic female genital cutting to violate girls’ federal and state constitutional rights,¹⁶⁵ what are the rights to which the Supreme Court was referring? It should be asked first, though,

157. *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

158. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

159. U.S. CONST. pmbl.

160. *See, e.g.*, MASS. CONST. art. 1, (West, Westlaw through Nov. 2012 amendments) provides: “All men are born free and equal, and have certain natural, essential, and unalienable rights; [including] the right of enjoying free and equal, and have certain natural, essential, and unalienable rights; [including] the right of enjoying and defending their lives and liberties . . . [and] that of seeking and obtaining their safety and happiness.”

161. *See Adamson v. California*, 332 U.S. 46, 51 (1947).

162. *See Bellotti v. Baird*, 443 U.S. 622, n.12 (1979) (citing *Planned Parenthood of Ctr. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

163. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

164. *See Marbury v. Madison*, 5 U.S. 137, 180 (1803).

165. 18 U.S.C. § 16.

whether boys have a right to the same protection against genital cutting as girls?

a. The Right to Equal Protection

Shea Lita Bond addressed this issue in her 1999 article, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment*.¹⁶⁶ Congress and sixteen states have banned female genital cutting except when medically necessary.¹⁶⁷ The American Academy of Pediatrics briefly recommended that its physicians perform a ritual pinprick of a girl's genitals if that might prevent more harmful genital cutting, even though this would have violated federal law.¹⁶⁸ This ignited a storm of protest, and the policy was quickly retired.¹⁶⁹ Thus, even a pinprick of girls' genitals is a federal crime. Physicians likewise cannot cut adults' genitals without their consent (an adult subjected to this could use force in self-defense, call the police, or successfully bring suit).¹⁷⁰

The Fourteenth Amendment to the United States Constitution prohibits states from enforcing laws that "deny to any person... equal protection of the laws".¹⁷¹ State constitutions also contain equal protection clauses.¹⁷² Bond concluded in her article that state statutes protecting females but not males from genital cutting violate the constitutional guarantee that similarly situated males and females should be treated equally before the law.¹⁷³ She reasoned that when state laws discriminate on the basis of gender, as here, the governments must show an "exceedingly persuasive justification" for

166. See generally Shea Lita Bond, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment*, 32 J. MARSHALL L. REV. 353 (1999).

167. *Female Genital Mutilation in the U.S. Factsheet*, EQUALITYNOW, <http://www.equalitynow.org/node/866> (last visited on Nov. 19, 2012).

168. Karen Glennon, *How I Became An Intactivist*, ATTORNEYS FOR THE RIGHTS OF THE CHILD NEWSLETTER, Summer, 2010, at 6.

169. Robert S. Van Howe, *The American Academy of Pediatrics and Female Genital Cutting: When National Organizations are Guided by Personal Agendas*, 27:3 ETHICS & MED. 165, 165 (2011).

170. See, e.g., BLACK'S LAW DICTIONARY (9th ed. 2009). Black's Law Dictionary defines tortious "battery" as "[a]n intentional and offensive touching of another without lawful justification." BLACK'S LAW DICTIONARY 173 (9th ed. 2009). "Self-defense" is defined generally as a "justification for the use of a reasonable amount of force in self-defense if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger." BLACK'S LAW DICTIONARY 1481 (9th ed. 2009). Circumcision without the permission of the person circumcised would almost certainly qualify as an "offensive" and tortious bodily contact that would warrant the use of self-defense.

171. U.S. CONST. amend. XIV, § 1.

172. See Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 106-07 n.168 (2003).

173. Bond, *supra* note 165, at 380.

doing so,”¹⁷⁴ which they cannot do. As stated, the male and female genitalia are identical in early gestation, are erogenous, and have evolved to function together.¹⁷⁵ Male and female circumcision are usually medically unnecessary,¹⁷⁶ are usually performed for religious and cultural reasons,¹⁷⁷ inflict serious pain,¹⁷⁸ risk medical complications and death,¹⁷⁹ and harm their victims.¹⁸⁰ Bond concluded that states must strike down statutes protecting girls from circumcision as unconstitutional or extend equal protection to boys.¹⁸¹ As discussed below, however, both male and female circumcision is unconstitutional. Thus, boys have a right to the same protection from genital cutting as girls.

b. The Right to Privacy

In 2010, the Royal Dutch Medical Association issued a policy statement that non-therapeutic circumcision violates children’s rights to physical integrity and autonomy under the Dutch Constitution.¹⁸² Article 10 thereof states, “Everyone shall have the right to respect for his privacy,”¹⁸³ while Article 11 provides, “Everyone shall have the right to inviolability of his person.”¹⁸⁴ As discussed below, non-therapeutic male circumcision similarly violates the privacy clauses of the United States Constitution and state constitutions.

174. Bond, *supra* note 165, at n.151 (“[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”) (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

175. Cold & Taylor, *supra* note 29; *Androgen Insensitivity Syndrome*, NAT’L HEALTH SERVICE, <http://www.nhs.uk/conditions/Androgen-insensitivity-syndrome/Pages/Introduction.aspx> (last visited Nov. 28, 2012).

176. Bond, *supra* note 165, at 366.

177. Bond, *supra* note 165, at 360.

178. Bond, *supra* note 165, at 362.

179. Bond, *supra* note 165, at 369.

180. Bond, *supra* note 165, at 362.

181. Bond, *supra* note 165, at 380; see also Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from their Infant Children?*, 7 AM. U. J. GENDER, SOC. POL’Y & THE L. 87, 120 (1998-1999) (“Overbroad distinctions between ‘genital mutilation’ and ‘circumcision’ cannot obscure the unconstitutional and discriminatory effect of the Anti-FGM Act.”)

182. *Non-Therapeutic Circumcision of Male Minors*, ROYAL DUTCH MED. ASSOC. 5 (2010), <http://knmg.artsennet.nl/web/file?uuid=579e836d-ea83-410f-9889-feb7eda87cd5&owner=a8a9ce0e-f42b-47a5-960e-be08025b7b04&contentid=77976>.

183. GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION] Sept. 22, 2008, Ch. 1, art. 10 (Neth.), available at <http://www.government.nl/documents-and-publications/regulations-/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

184. GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION] Sept. 22, 2008, Ch. 1, art. 11 (Neth.), available at <http://www.government.nl/documents-and-publications/regulations-/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

The United States Supreme Court held that the protections given by the Bill of Rights imply a constitutional personal right to privacy.¹⁸⁵ In *Roe v. Wade*, for example, the Supreme Court held that a woman has a constitutional right of privacy to make her own decisions about her body and pregnancy, independent of her parents' beliefs and desires.¹⁸⁶ A few state constitutions also expressly guarantee their citizens the right to privacy.¹⁸⁷ State privacy rights are broader than their federal counterpart, and are not limited to "state action," but also apply to private individuals.¹⁸⁸ As the California Court of Appeals held in *American Academy of Pediatrics v. Lungren*, citing United States Supreme Court decisions,¹⁸⁹ individuals have an inalienable constitutional right of privacy or liberty to make their own decisions in matters related to sex, life, and health.¹⁹⁰ In *Eisenstadt v. Baird*, the United States Supreme Court stated, "[i]f the right of privacy means anything, it is the right of the individual... to be free from unwarranted governmental intrusion" into matters fundamentally affecting a person.¹⁹¹ The California court stated that bodily intrusions violate the privacy right, which includes "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." ¹⁹² The California court called the right of a minor female to make important choices about her own body "clearly among the most intimate and fundamental of all constitutional rights."¹⁹³

Interpreting the privacy clause in the Montana constitution, the Supreme Court of Montana similarly stated that "few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health."¹⁹⁴ The court stated that bodily autonomy is violated by a surgical operation ("invasion") imposed against a person's will.¹⁹⁵ The court cited Professor Joel Feinberg: "For to say that I

185. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a right to privacy is implied by the 1st, 3rd, 4th, 5th, and 9th Amendments).

186. *Roe v. Wade*, 410 U.S. 113, 153 (1972).

187. See, e.g., ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23.

188. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 810 (Cal. 1997).

189. *Id.* at 803-04.

190. *Id.* at 814.

191. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

192. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 654 (Cal. 1994).

193. *Lungren*, 940 P.2d at 812.

194. *Armstrong v. Montana*, 989 P.2d 364, 378 (Mont. 1999).

195. *Id.*

am sovereign over my bodily territory is to say that I, and I alone, decide.”¹⁹⁶ The court cited a federal case involving acupuncture:

Indeed, medical treatment decisions are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease... who must undergo or forego the treatment... [and] who, if he or she survives, must live with the results of that decision. One’s health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature.... The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one’s economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.¹⁹⁷

Most men consider their genitals to be highly personal and private. Indeed, genitalia are often called “private parts,” and indecent exposure of them is a crime.¹⁹⁸ Circumcision is manifestly an important and irreversible decision¹⁹⁹ central to the safety, health, personal dignity, and autonomy of men. Since boys and men rarely choose circumcision for themselves,²⁰⁰ and it impairs men’s sex lives (the only question is to what extent),²⁰¹ the decision to remove a foreskin is of profound importance. Under the privacy clauses of federal and state constitutions,²⁰² boys have a constitutional or absolute right to make a choice about circumcision without government interference.

c. The Right to Life, Liberty, Property, and the Pursuit of Happiness

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”²⁰³ State constitutions sometimes contain similar language, and sometimes add that there is a right to the pursuit of happiness.²⁰⁴ Circumcision violates the right of every boy to life (it can be

196. *Id.*

197. *See* *Andrews v. Ballard*, 498 F. Supp. 1038, 1046–48 (S.D. Tex. 1980).

198. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-402A (1996).

199. The British Medical Association has noted that courts have described circumcision as an “important and irreversible decision.” *The Law and Ethics of Male Circumcision: Guidance for Doctors*, 30 J. MED. ETHICS 259, 261 (2004).

200. *Id.* at 261.

201. Rita Carter & Anna Rockall, *How to Reverse the Irreversible*, THE INDEPENDENT (June 25, 1996), <http://www.independent.co.uk/life-style/health-and-families/health-news/how-to-reverse-the-irreversible-1338650.html>.

202. *See, e.g.*, U.S. CONST. amend. XIV, § 1; CAL. CONST. ART. 1, § 1.

203. U.S. CONST. amend. XIV, § 1.

204. *See, e.g.*, ILL. CONST. art. 1, § 1 (West 2006) (“Inherent and Inalienable Rights: All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness.”).

fatal),²⁰⁵ to personal security (it is invasive, risky, and harmful),²⁰⁶ to liberty (the autonomy to make the circumcision decision for himself as an adult), to property (one's body parts are surely one's property), and to pursue happiness however he chooses. Thus, boys have absolute constitutional rights under various provisions of the Fourteenth Amendment to be free from government interference in their decision to be left intact.

d. The Right to Freedom of Religion

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁰⁷ Every individual, including every boy, has a right to freedom of religion.²⁰⁸ Once a boy reaches the age of reason, he has the constitutional right to choose his parents' religion, a different religion, or no religion.²⁰⁹ Although parents can permanently disfigure their own bodies or faces for religious reasons, it violates a boy's right to freedom of religion to brand him permanently as belonging to a religion that he may choose to renounce.²¹⁰ In fact, many adults do not follow the religion in which they were raised.²¹¹ For example, 15% of those raised in the Jewish faith no longer follow it,²¹² and some Jews are opposed to circumcision.²¹³ Boys have a constitutional right under the Freedom of Religion clause to make the choice to be left genitally intact without government interference.

205. See, e.g., Gregory J. Boyle, J. Steven Svoboda, Christopher P. Price & J. Neville Turner, *Circumcision of Healthy Boys: Criminal Assault?*, 7 J.L. & MED. 301 (2000), available at <http://www.cirp.org/library/legal/boyle1/>.

206. See, e.g., *id.*

207. U.S. CONST. amend. I.

208. See, e.g., ILL. CONST. art. 1, § 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion."); see also COLO. CONST. art. 2, § 4.

209. See, e.g., R. Van Howe, J. Svoboda, J. Dwyer & C.P. Price, *Involuntary Circumcision: The Legal Issues*, 83 BRIT. J. UROLOGY, Supp. 1, 1999, at 63, 67.

210. *Id.* at 68 ("Parents choosing circumcision for religious reasons may in fact be violating the child's own religious freedom, including the freedom to change religious beliefs.").

211. The Pew Forum on Religion & Public Life, *Changes in Americans' Religious Affiliation*, U.S. REL. LANDSCAPE SURV. 22–24 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-chapter-2.pdf>.

212. *Id.* at 22.

213. See generally, JEWS AGAINST CIRCUMCISION, <http://www.jewssagainstcircumcision.org/> (last visited Nov. 1, 2012).

3. Criminal Law

a. The Child Abuse Statutes

In a 1985 law review article, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, William Brigman called routine neonatal circumcision the most widespread form of child abuse in society today.²¹⁴ Every state has statutes and policies designed to prevent and punish child neglect and abuse.²¹⁵ In California, for example, cutting a girl's genitals is expressly listed as child abuse and is classified as a felony.²¹⁶ Male circumcision appears to meet California's general definitions of and therefore constitutes criminal child abuse,²¹⁷ as well as assault,²¹⁸ battery,²¹⁹ and sexual abuse and sexual assault (“[a]ny intrusion by one person into the genitals... of another person... [except] for a valid medical purpose”).²²⁰ The California Penal Code also prohibits willfully harming, injuring, or endangering a child,²²¹ inflicting any cruel or inhuman injury upon a child resulting in a traumatic condition,²²² inflicting physical injury or death other than by accidental means upon a child,²²³ and mayhem (“unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless”).²²⁴ Similarly, under the Massachusetts child abuse statute, it is criminal assault and battery to intentionally touch a child in a way that causes bodily injury or substantial bodily injury without justification or excuse,²²⁵ as circumcision does. Thus,

214. William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 U. LOUISVILLE J. FAM. L. 337, 338 (1985). Brigman wrote that it might not be viewed as such because it is so common, but called it “as barbarous as female circumcision, the removal of earlobes, fingers or toes, the binding of infant female feet or other disfiguring practices around the world.” *Id.*

215. The Child Welfare Information Gateway provides detailed information on child abuse policies and statutes throughout the country. U.S. Dept. Health & Human Serv., *State Statutes Search*, CHILD WELFARE INFORMATION GATEWAY, https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm (last visited March 1, 2013).

216. CAL. PENAL CODE ANN § 273.4 (West 2008).

217. *Id.* at § 273.

218. *Id.* at § 240.

219. *Id.* at § 242.

220. *Id.* at § 11165.1.

221. *Id.* at §§ 11165.2-5.3.

222. CAL. PENAL CODE ANN. § 273(d).

223. *Id.* at § 11165.6.

224. *Id.* at §203. This assumes that unnecessary surgery meets the statutory definition of “malicious.” *Id.* at § 220(a) (“[A]ny person who assaults another with intent to commit mayhem . . . shall be punished by imprisonment . . . for two, four, or six years.”).

225. MASS. GEN. LAWS ch. 265 § 13J(a)-(b) (2012) (stating that “[p]hysical injury” includes “swelling, bruising, impairment of any organ, and any other such nontrivial injury” and “[s]ubstantial bodily injury” is defined as a bodily injury which creates a permanent disfigurement, protracted loss or

physicians and Jewish mohels who circumcise, along with the parents who authorize it, commit criminal child abuse and are subject to the applicable fines and imprisonment.²²⁶

A 2010 Texas appellate case, *Williamson v. State*, confirms that any unnecessary surgery on children constitutes statutory child abuse.²²⁷ The *Williamson* court held a mother criminally liable for unnecessary surgery that caused serious bodily injury to her son,²²⁸ defined in Texas as “an injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”²²⁹ A physician testified that unnecessary surgery does not constitute reasonable medical care.²³⁰ The court also found a scalpel to meet the definition of a “deadly weapon” as it can cause death or serious bodily injury.²³¹ Circumcision, whether male or female, is thus criminal child abuse.

b. Criminal Assault

As stated in the Introduction, in June 2012, a court in Cologne, Germany, held that non-therapeutic circumcision causes grievous bodily harm without legal justification.²³² In a 1999 law review article, *Male Non-Therapeutic Circumcision: The Legal and Ethical Issues*, Christopher Price wrote that lawyers in four common-law jurisdictions (the United States, England, Canada, and Australia) agree that non-therapeutic circumcision constitutes criminal assault, even though it has not been prosecuted.²³³ Boyle²³⁴ and Somerville²³⁵ reached the same conclusion the following year. Under the common law, battery and false imprisonment coupled with force and

impairment of a function of a body member, limb or organ, or substantial risk of death”), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartIV/Title1/Chapter265/Section13J>).

226. See 110 MASS. CODE REGS. § 2.00 (2008) (stating “[a]buse” in Massachusetts includes an intentional act by a caretaker “upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury”), available at <http://www.lawlib.state.ma.us/source/mass/cmr/110cmr.html>.

227. *Williamson v. State*, 356 S.W.3d 1, 5 (Tex. Crim. App. 2010).

228. *Id.* (affirming the judgment of the trial court).

229. TEX. PENAL CODE ANN. § 1.07(a)(46) (West 2011).

230. *Williamson*, 356 S.W.3d at 15.

231. TEX. PENAL CODE ANN., at § 1.07(a)(17); see also *Williamson*, 356 S.W.3d at 20.

232. BBC NEWS EUROPE, *supra* note 23.

233. Christopher P. Price, *Male Non-Therapeutic Circumcision: The Legal and Ethical Issues*, in MALE AND FEMALE CIRCUMCISION: MEDICAL, LEGAL, AND ETHICAL CONSIDERATIONS IN PEDIATRIC PRACTICE 425, 437 (George C. Denniston, Frederick M. Hodges & Marilyn F. Milos eds., 1999).

234. BOYLE ET AL., *supra* note 204.

235. MARGARET SOMERVILLE, THE ETHICAL CANARY: SCIENCE, SOCIETY AND THE HUMAN SPIRIT 202–19 (2000), excerpt available at <http://www.circumstitions.com/Canary.html#cv>.

violence are criminal as well as civil injuries.²³⁶ Any application of force is *prima facie* an assault.²³⁷ Consent is a defense only to assaults that do not inflict actual bodily harm.²³⁸ Medical treatment is an exception to assaults causing bodily harm,²³⁹ but non-therapeutic circumcision is not medical treatment.²⁴⁰ American courts also have noted that children, and particularly very young children, are especially vulnerable, require protection under criminal law, and that crimes against them are morally outrageous.²⁴¹

A 2006 Washington appeals court decision, *State v. Baxter*, held that circumcision by a parent constitutes criminal assault.²⁴² The court upheld the conviction of a father for assault for attempting to circumcise his eight year-old child.²⁴³ The court reasoned that “the harm Baxter inflicted on his son triggered the State’s right to impose criminal liability.”²⁴⁴ Insofar as circumcision harms all boys and men, even when performed by physicians, the same reasoning that applies to parents should apply to physicians. In summary, circumcision constitutes statutory assault and battery, child abuse, sexual assault, child endangerment, and mayhem, and even manslaughter when it results in accidental death.²⁴⁵ These rights derive from and exist today under the criminal common law.

4. Tort Law

Blackstone noted that, insofar as every man’s person is sacred, the least touching of it willfully without legal authority to do so is an unlawful battery.²⁴⁶ A person is liable to another for civil battery for intentionally

236. 3 WILLIAM BLACKSTONE, COMMENTARIES, *617, *673–4.

237. See, e.g., BOYLE ET AL., *supra* note 204.

238. *Id.*

239. *Id.*

240. See J. Steven Svoboda et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL’Y 61, 89–90, 94 (2000).

241. *Henderson v. State*, 962 S.W.2d 544, 562 (Tex. Crim. App. 1997) (“Children are deemed to warrant protection because of their inexperience, lack of social and intellectual development, moral innocence, and vulnerability. These characteristics apply with the greatest force to the youngest children. Moreover, the fact that crimes directed toward young children are necessarily targeted at the most innocent and vulnerable members of society makes such crimes among the most morally outrageous. ‘[E]xpression of society’s moral outrage at particularly offensive conduct ... is essential in an ordered society. . . .’”) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

242. *State v. Baxter*, 141 P.3d 92, 93 (Wash. App. Div. 2 2006).

243. *Id.*

244. *Id.* at 99.

245. See SOMERVILLE, *supra* note 234.

246. BLACKSTONE, *supra* note 235, at *120 (“[t]he least touching of another’s person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore

causing any harmful or offensive contact.²⁴⁷ Even a surgeon is liable for a battery absent the patient's consent or the valid consent of a third person.²⁴⁸ As argued below, however, parental consent to circumcision is invalid.²⁴⁹ Margaret Somerville concluded in 2000, "[p]hysicians who undertake infant male circumcision could be legally liable for medical malpractice (civil liability in battery or negligence), which can result in an award of damages simply for carrying out the circumcision even if it was competently performed."²⁵⁰ Circumcision also constitutes the dignitary tort of false imprisonment.²⁵¹ Damages for torts include pain and suffering, and thus would include surgical and post-surgical pain, loss of sexual function and pleasure, and psychological harm, to the extent demonstrable by a preponderance of the evidence.²⁵²

5. Human Rights Law

Several United Nations documents together form the "International Bill of Rights."²⁵³ The U.N. Charter requires member states to promote human rights and fundamental freedoms without distinction as to race, sex, or religion.²⁵⁴ The Charter specifies that children have the same human rights as adults,²⁵⁵ and special rights arising from their need for protection during minority.²⁵⁶ The 1948 Universal Declaration of Human Rights recognizes every person's right to life, liberty, and security of the person, and to freedom from cruel or degrading treatment.²⁵⁷ The 1996 International Covenant on Civil and Political Rights gives minors the right to protection from family, society, and the state.²⁵⁸ The 1989 Convention on the Rights

totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.").

247. See RESTATEMENT (SECOND) OF TORTS § 13(a) (1965).

248. *Id.* at § 13 comment (c). But see *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 768 (Tex. 2003) (noting that a physician who provides emergency, life-saving medical treatment to a child without parental consent is not liable for battery); *Montgomery v. Bazaz-Sehgal*, 742 A.2d 1125, 1131 (Pa. Super. Ct. 1999).

249. See SOMERVILLE, *supra* note 234.

250. *Id.*

251. RESTATEMENT (SECOND) OF TORTS § 35 (1965).

252. RESTATEMENT (SECOND) OF TORTS § 903 (1979).

253. See generally International Bill of Rights, G.A. Res. 217 (III), GAOR, 183d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

254. See U.N. Charter pmb., available at <http://www2.ohchr.org/english/docs/UNcharter.pdf>; see also *Id.* art. 55.

255. See Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 20 (Dec. 10, 1959).

256. See *id.*

257. See Universal Declaration of Human Rights, G.A. Res. 217A (III), GAOR, 183d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

258. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art 5., ¶ 1, U.N.

of the Child, although ratified by every nation except the United States and Somalia,²⁵⁹ establishes international law applicable to children worldwide.²⁶⁰ Article 3 requires member states' legal institutions to make their primary consideration the best interests of the child, and to ensure the child such protection and care as is necessary for his or her well-being.²⁶¹ Article 6 recognizes that every child has the inherent right to life.²⁶² Article 19 recognizes children's rights to special protection from mental or physical violence or abuse, by parents or anyone caring for the child.²⁶³ Article 24.3 requires abolishing traditional practices prejudicial to the health of children.²⁶⁴ Article 34 protects children from sexual abuse.²⁶⁵ Article 36 protects children from exploitation prejudicial to the child's welfare.²⁶⁶

The Royal Dutch Medical Association,²⁶⁷ the South African Medical Association,²⁶⁸ the Tasmania Law Reform Institute,²⁶⁹ the Slovenian human rights ombudsman,²⁷⁰ and the Norwegian ombudsman²⁷¹ all have concluded that male circumcision constitutes a human rights violation. In an article published by the Netherlands Institute of Human Rights,²⁷² Jacqueline Smith wrote,

GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 10, 1948).

259. *Protect Children's Human Rights*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child> (last visited Nov. 16, 2012).

260. *Id.*

261. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 167 (Nov. 20, 1989).

262. *Id.* at 168.

263. *Id.* at 169.

264. *Id.* at 169–70.

265. *Id.* at 171.

266. *Id.*

267. See ROYAL DUTCH MEDICAL ASSOCIATION (KNMG), *Circumcision Policy*, (May 27, 2010), KNMG-viewpoint-Non-therapeutic-circumcision-of-male-minors-27-05-2010-v2.pdf (adopting a policy of strong deterrence due in part to the increasing emphasis on children's rights).

268. See Jonathan Friedman, *South African Medical Association Denounces Circumcision of Infants*, 9 ATT'YS FOR THE RTS. OF THE CHILD, No. 1, June 2, 2011, available at <http://arclaw.org/newsletter/vol-9/no-1/news/south-african-medical> (denouncing male infant circumcision as "unethical" and "illegal").

269. See TASMANIA L. REFORM INST., *Non-Therapeutic Male Circumcision Final Report 17 22* (Aug. 2012), http://www.utas.edu.au/__data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf.

270. See generally *Circumcision of Boys for Non-Medical Reasons is a Violation of Children's Rights Says Slovenia's Human Rights Ombudsman*, NAT'L COAL. FOR MEN, Feb. 16, 2012, <http://ncfm.org/2012/02/news/circumcision-news/circumcision-of-boys-for-non-medical-reasons-is-a-violation-of-childrens-rights-says-slovenias-human-rights-ombudsman/>.

271. Norway: *Ombudsman Proposes Setting Minimum Age for Male Circumcision*, CHILD RTS. INT'L NETWORK (Feb. 09, 2011), <http://www.crin.org/violence/search/closeup.asp?infoID=25991>.

272. See generally Jacqueline Smith, *Male Circumcision and the Rights of the Child*, CIRCUMCISION REFERENCE LIBR. (Jan. 3, 2008), <http://www.cirp.org/library/legal/smith/>.

The focus must be placed on the children who are forced to suffer without consent. Male circumcision is, like female genital mutilation, a “harmful traditional practice” and as such is in violation with the rights of the child. It is necessary to advocate full respect for these human rights for all children, boys and girls alike.²⁷³

The British Medical Association has also stated that if circumcision is prejudicial to a child’s health and wellbeing, which it is, it is likely that a legal challenge on human rights grounds will be successful.²⁷⁴ Thus, circumcision is a human rights violation.

6. Public Policy

In *State v. Baxter*,²⁷⁵ the Washington appeals court stated, “[c]utting a child’s genitalia is also disfavored in public policy,”²⁷⁶ citing the federal and state laws prohibiting female circumcision.²⁷⁷ Thus, male circumcision is also unlawful as contrary to public policy.

In summary, under numerous provisions of American law and international law, boys, like girls, have the right to genital integrity and to be free from harm. Children also have a special right to freedom from harmful practices like ritual or routine circumcision by reason of their vulnerability.

B. Do Physicians Have the Legal Right to Circumcise Healthy Boys?

As shown in Part A, above, boys have the absolute right under the common law and federal and state constitutional law, and under the criminal law, tort law, and human rights law, to be left genitally intact. The rules of medical ethics also require physicians to respect human dignity and rights.²⁷⁸ Therefore, one does not even reach the question of whether physicians can lawfully perform non-therapeutic circumcisions. If one did reach the question, however, there are various additional legal reasons why they cannot.

273. *Id.* at 10.

274. See generally *The Law & Ethics of Male Circumcision - Guidance for Doctors*, CIRCUMCISION REFERENCE LIBR., (June 15, 2006), <http://www.cirp.org/library/statements/bma2003/>.

275. *State v. Baxter*, 141 P.3d 92 (Wash. App. Div. 2, 2006).

276. *Id.* at 93.

277. *Id.*

278. AMA Code of Med. Ethics, Principles of Medical Ethics, Rule I (2001).

1. Physicians Cannot Discriminate Against Boys

The American Academy of Pediatrics calls non-therapeutic female genital cutting potentially fatal²⁷⁹ and child abuse,²⁸⁰ and acknowledges that even a pinprick of a girl's genitals is a federal crime.²⁸¹ As discussed above, under the Equal Protection Clause of the federal and state constitutions, and under international law, physicians must treat boys the same way that they treat girls.²⁸² The rules of medical ethics similarly prohibit physicians from discriminating on the basis of sex.²⁸³ American Medical Association Policy H-65.992 is "to oppose any discrimination based on an individual's sex,"²⁸⁴ and the association's long-standing Policy H-65.990 is that no human being shall be denied equal rights due to an individual's sex, gender, religion, or origin.²⁸⁵ A 2001 American Academy of Pediatrics committee report reaffirms that pediatricians cannot discriminate against children in pediatric health care.²⁸⁶ Circumcision also discriminates against boys on the basis of age, since physicians do not circumcise men or women against their will.

2. Physicians Cannot Lawfully Operate on Healthy Boys

In 2010, the Royal Dutch Medicine Association stated that the rule for physicians is "do not operate on healthy children."²⁸⁷ As discussed below, that is the ethical and legal rule for American physicians, as well.

a. *Healthy Boys Are Not Patients*

Insofar as the physician-patient relationship is contractual and consensual,²⁸⁸ physicians must have a patient before they can provide medical services. "Patient" includes a person suffering or needing medical

279. Press Release, American Academy of Pediatrics (May 27, 2010), available at <http://www2.aap.org/advocacy/releases/fgc-may27-2010.htm> (retrieved November 1, 2012).

280. American Academy of Pediatrics, *Female Genital Mutilation*, 102 PEDIATRICS, no. 1, 1998, at 156, available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;102/1/153>.

281. Press Release, *supra* note 278 ("The AAP does not endorse the practice of offering a 'clitoral nick'").

282. U.S. CONST. amend. XIV, § 1.

283. AMA Code of Medical Ethics, Op. 9.122 (2001).

284. AMA Code of Medical Ethics, AMA Policies on GLBT Issues, No. H-65.992.

285. *Id.* at H-65.990.

286. Am. Acad. of Pediatrics, *Nondiscrimination in Pediatric Health Care*, 108 J. OF THE AM. ACAD. OF PEDIATRICS 1215 (2001).

287. Press Release, Royal Dutch Med. Ass'n (2010), available at http://www.circinfo.org/Dutch_circumcision_policy.html.

288. See generally 70 C.J.S. *Physicians* § 76.

or surgical treatment,²⁸⁹ and those needing medical advice or preventive medicine.²⁹⁰ Initially, newborn boys are patients: their health status is evaluated, and they are given interventions such as eye drops and vaccinations to protect them from disease.²⁹¹ Thereafter, however, physicians do not have the right to perform unnecessary cosmetic medical procedures on them.²⁹²

In New Hampshire, for example, before a physician can perform a procedure, patients (or their proxies) must “be fully informed in writing by a health care provider of his or her medical condition, health care needs, and diagnostic test results,”²⁹³ and be given the opportunity to participate in his or her care and medical treatment and to exercise the right to refuse treatment.²⁹⁴ A circumcision consent form, by contrast, describes the initial diagnosis or condition as “uncircumcised newborn male.”²⁹⁵ A healthcare cost review organization states that the most common diagnosis and condition in hospitals is “newborn infant,”²⁹⁶ for whom the most common treatment is “circumcision.”²⁹⁷ “Healthy newborn” and “uncircumcised newborn male” are not diagnoses, circumcision is not treatment, and children pronounced to be healthy are not legitimate candidates for unnecessary surgery. AMA Ethical Rule 8.03 also states:

Under no circumstances may physicians place their own financial interests above the welfare of their patients. ... For a physician to unnecessarily hospitalize a patient... for the physician’s financial benefit is unethical. If a conflict develops between the physician’s financial interest and the physician’s responsibilities to the patient, the conflict must be resolved to the patient’s benefit.²⁹⁸

Once newborn boys are pronounced healthy and immunized, physicians have no more right to operate on them than they would on boys outside the hospital.

289. *Id.* § 1 n. 25 (citing *Glatzmayer v. U.S.* 84 F.2d 192 (5th Cir. 1936)).

290. *Id.* § 1.

291. *Id.* § 76.

292. *Id.* § 79.

293. N.H. REV. STAT. ANN. § 332-I:2(e).

294. *Id.*

295. *See, e.g.,* Consent Form, Univ. of Va. Health Sys., available at <http://www.virginia.edu/uvaprint/HSC/pdf/040162.pdf> (retrieved May 9, 2012).

296. ELIZABETH STRANGES, LAUREL HOLMQUIST & ROXANNE M. ANDREWS, STATISTICAL BRIEF 85: INPATIENT STAYS IN RURAL HOSPITALS, 2007 (2010), available at <http://hcup-us.ahrq.gov/reports/statbriefs/sb85.jsp>.

297. *Id.*

298. AMA CODE OF MED. ETHICS, Op. 8.03 (1994).

b. Circumcision Is Not Within the Scope of Medicine

Physicians are licensed to practice medicine only within the scope of their state medical licenses.²⁹⁹ A physician is a person responsible for the treatment and care of patients.³⁰⁰ Medicine is “to treat diseases and restore or preserve health.”³⁰¹ In regards to surgery, a Mississippi appeals court stated,

[s]urgery deals with the diagnosis and treatment of *injury, deformity, and disease* through an operation or procedure. A patient sees a surgeon because there is *the need for an invasive procedure....* [T]he surgeon determines whether a surgical procedure is *medically necessary*.³⁰²

Some state regulations, such as those in Massachusetts,³⁰³ prohibit physicians from practicing medicine “beyond its authorized scope” at the risk of the loss of their licenses.³⁰⁴ Likewise, California medical licenses authorize the holder to “sever or penetrate the tissues of human beings and to use any and all other methods in the *treatment* of diseases, injuries, deformities, and other physical and mental conditions.”³⁰⁵ Physicians also have an ethical duty to combat assaults on the health and wellbeing of humankind, and to ameliorate suffering and contribute to human wellbeing.³⁰⁶

Circumcision is non-therapeutic and usually performed for non-medical reasons.³⁰⁷ The diagnostic code for non-therapeutic circumcision is ritual or routine elective surgery in the absence of medical need.³⁰⁸ Circumcision is not preventive medicine like immunizations either: it does not benefit the

299. Am. Med. Ass’n, *Medical Licensure*, available at <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician/medical-licensure.page> (last visited March 4, 2013).

300. See, e.g., MICH. COMP. LAWS § 333.20102 (2010).

301. *Medicine Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/medicine> (last visited Nov. 19, 2012).

302. *Meeks v. Miller*, 956 So. 2d 942, 947 (Miss. App. 2006) (emphasis added).

303. 243 MASS. CODE REGS. § 2.01 (2012).

304. MASS. GEN. LAWS ch. 112, § 5.

305. CAL. BUS. & PROF. CODE § 2051 (West 2012), available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=02001-03000&file=2050-2079> (emphasis added).

306. Frank A. Riddick, Jr., *A Declaration of Professional Responsibility*, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS REPORT 5-1-01 (2001), available at <http://www.ama-assn.org/resources/doc/ethics/decofprofessional.pdf> (last retrieved Nov. 1, 2012).

307. *Circumcision-Why It May Be Done*, WEBMD, <http://children.webmd.com/tc/circumcision-why-it-is-done?> (last visited Nov. 19, 2012).

308. *Circumcision Diagnosis Code*, ICD9DATA.COM, <http://www.icd9data.com/2012/Volume1/V01-V91/V50-V59/V50/V50.2.htm> (last visited Nov. 19, 2012).

vast majority of boys or men.³⁰⁹ Simply stated, circumcision is not medical care, health care, or medicine. It is unlawful as beyond the scope of medicine.

c. Unnecessary Surgery on Children Is Unlawful

It is unethical and a conflict of interest for physicians to unnecessarily hospitalize or operate upon a patient purely for the physician's benefit.³¹⁰ "If a conflict develops between the physician's financial interest and the physician's responsibilities to the patient, the conflict must be resolved to the patient's benefit."³¹¹ The AMA Rules of Medical Ethics also prohibit American physicians from providing or charging for unnecessary services.³¹² Urologists likewise pledge, "I will condemn unnecessary surgery as an extremely serious ethical violation."³¹³

In many jurisdictions, this is a legal as well as an ethical rule. In *Williamson v. Texas*, a physician testified that unnecessary surgeries on children do not constitute reasonable medical care.³¹⁴ In fact, they do not constitute medical care at all. Florida medical guidelines, for example, prohibit "a procedure that is medically unnecessary or otherwise unrelated to the patient's diagnosis or medical condition."³¹⁵ Massachusetts regulations similarly require reporting of physicians "who have engaged in a pattern of abuse such as... [u]nnecessary surgery."³¹⁶ Illinois law provides a form to make claims against physicians for unnecessary surgery.³¹⁷ Thus, the rules of medical ethics and the laws of many states prohibit physicians from performing unnecessary surgery on healthy children.

3. Physicians Cannot Endanger or Harm Boys Unnecessarily

As discussed above, child abuse statutes in every state prohibit physicians from endangering or harming a child except in the presence of a valid medical purpose.³¹⁸ As courts have noted, unnecessary surgery is

309. *Circumcision-Why It May Be Done*, WEBMD, <http://children.webmd.com/tc/circumcision-why-it-is-done?> (last visited Nov. 19, 2012).

310. AMA CODE OF MED. ETHICS, Op. 8.03 (1994).

311. *Id.*

312. *Id.* at 2.19.

313. AM. UROLOGICAL ASS'N CODE OF ETHICS, Rule 8.

314. *Williamson v. State*, 356 S.W.3d 1, 15 (Tex. App. 2010).

315. FLA. ADMIN. CODE ANN. r. 64B8-8.001 (2012).

316. 243 MASS. CODE REGS. § 2.14(5)(k) (2012).

317. ILL. ADMIN. CODE tit. 50, § 928 Exh. B (2006).

318. See CAL. PENAL CODE ANN., *supra* note 247.

inherently harmful.³¹⁹ For example, in 2006, in *Tortorella v. Castro*, a doctor misread an MRI scan and removed healthy tissue.³²⁰ In holding him liable, the California appeals court stated, “it seems self-evident that unnecessary surgery is injurious and causes harm to a patient. Even if a surgery is executed flawlessly, if the surgery were unnecessary, the surgery in and of itself constitutes harm...”³²¹ The court stated further, “the patient needlessly has gone under the knife and has been subject to pain and suffering.”³²² In addition, the most fundamental ethical rule for physicians is, “first, do no harm.”³²³ The American Academy of Pediatrics Committee on Bioethics also acknowledges that children deserve effective medical treatment that is likely to prevent substantial harm or suffering or death.³²⁴ Circumcision, by contrast, is not medical treatment, benefits few men, if any, and causes substantial harm, suffering, and occasionally death.³²⁵

4. A Physician’s Legal Duty Is to the Patient

The American Academy of Pediatrics Ethics Committee wrote in 1995,

“[P]roxy consent” poses serious problems for pediatric health care providers. Such providers have legal and ethical duties to their child patients *to render competent medical care based on what the patient needs, not what someone else expresses....* [T]he pediatrician’s responsibilities to his or her patient exist independent of parental desires or proxy consent.³²⁶

Similarly, the AAP advocates legal intervention whenever children are endangered or might be harmed due to a parent’s religious beliefs, and acknowledges that the law prohibits physicians and parents from harming children for religious reasons.³²⁷ Thus, it is unethical and unlawful for

319. See *Tortorella v. Castro*, 43 Cal. Rptr. 3d 853, 860 (Cal. Dist. Ct. App. 2006).

320. *Id.* at 855–56.

321. *Id.* at 860.

322. *Id.* at 862. See also *Dilieto v. Cnty. Obstetrics & Gynecology Grp.*, 297 Conn. 105 (2010) (physician liable for unnecessary removal of patient’s reproductive organs); *Murphy v. Blau*, 2010 WL 745056 (Conn. 2010) (doctor negligent in performing unnecessary surgery and failing to communicate the risks to the patient).

323. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 120 (3d ed. 1989).

324. Am. Acad. of Pediatrics, *Religious Objections to Medical Care*, 99 PEDIATRICS 279, 279–81 (1997).

325. *Circumcision Policy Statement*, *supra* note 41; Bond, *supra* note 177.

326. Am. Acad. of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 PEDIATRICS 314, 315 (1995) (emphasis added).

327. Am. Acad. of Pediatrics, *Religious Exemptions from Child Abuse Statutes*, 81 PEDIATRICS 169, 170–71 (1988) (“[T]he constitutional guarantees of freedom of religion do not sanction harming another person in the practice of one’s religion, and they do not allow religion to be a legal defense when one

physicians to perform unnecessary surgery on children that they do not recommend, and to take orders from parents for personal, religious, or cultural reasons having nothing to do with health.

5. Circumcision Violates the Rule of Proportionality

As surgical consent forms show, physicians have a legal duty to offer patients alternative medically reasonable courses of treatment, including no treatment, and to consider and disclose the related risks of each to patients or their proxies.³²⁸ The ethical rule of proportionality likewise requires that physicians weigh the risks and rewards of alternative treatments and of no treatment.³²⁹ Given that American medical associations call circumcision unnecessary,³³⁰ it is risky and harmful, few men benefit from it, and diseases can be prevented more effectively without it, circumcision violates the rule of proportionality. As the British Medical Association concluded, “[t]o circumcise for therapeutic reasons where medical research has shown other techniques to be at least as effective and less invasive would be unethical and inappropriate”.³³¹

6. Circumcision Violates the Best Interests Rule

Pediatric physicians have an ethical³³² and legal³³³ duty to act in the best interests of each child patient who needs medical care. Circumcision violates the “best interests of the child” rule. First, it precludes physicians from operating on many boys to benefit only a few.³³⁴ For example, one study suggests that it would be necessary to circumcise 322,000 boys to prevent one case of penile cancer,³³⁵ which would result in 644

harms another.”).

328. See *Matthies v. Mastromonaco*, 733 A.2d 456, 460 (N.J. 1999); *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C.C. 1972).

329. See Tetsuro Shimizu, *Non-Consequentialist Theory of Proportionality: With Reference to the Ethical Controversy Over Sedation in Terminal Care*, 2 JOURNAL OF PHILOSOPHY AND ETHICS IN HEALTH CARE AND MED., 4, 12 (Jul. 2007).

330. *AMA Adopts New Policies During Final Days of Semi-Annual Meeting*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/news/news/2011-11-15-ama-adopts-new-policies.page> (last visited Nov. 15 2011).

331. British Med. Ass’n, *The Law & Ethics of Male Circumcision - Guidance for Doctors*, 30 J. MED. ETHICS 259, 259–63 (2004), available at <http://jme.bmj.com/content/30/3/259.full.pdf+html>.

332. See *id.*

333. See *In re Richardson*, 284 So.2d 185, 187 (La. Ct. App. 1973) (The law protects a minor’s right to be free in his person from bodily intrusion to the extent of loss of an organ, unless this loss be in the best interest of the minor).

334. See, e.g., *Circumcision: Position Paper on Neonatal Circumcision*, AM. ACAD. OF FAMILY PHYSICIANS (Aug. 2007), <http://www.aafp.org/online/en/home/clinical/clinicalrecs/guidelines/Circumcision.html>.

335. *Id.*

complications.³³⁶ Physicians cannot lawfully sacrifice the many to benefit the few. Second, the best interests rule requires physicians to choose whatever medical treatment a child would choose for himself, when that can be determined.³³⁷ The circumcision choice of newborn boys can be inferred based on the overwhelming preferences of adult men, as intact men rarely volunteer to be circumcised and adults only rarely request the amputation of functional body parts. Third, American medical associations do not recommend circumcision;³³⁸ in 1999, the AMA called it medically unjustified,³³⁹ and in 2012, the AAP acknowledged that at best, circumcision slightly reduces the risk of diseases.³⁴⁰ Thus, the professional opinion of the AMA seems to be that circumcision is not in the best interest of boys. Due to the many disadvantages to circumcision, and the fact that intact men rarely choose it for themselves, physicians would be unable to prove by a preponderance of the evidence that it is in the best interest of boys.

7. Is Circumcision a Fraud and an Unfair and Deceptive Act and Practice?

Some physicians no doubt mistakenly believe that circumcision will benefit every boy and man. Some physicians who circumcise, however, do not disclose the truth about it. In the late 1800s and early 1900s, physicians claimed falsely that circumcision prevents a succession of diseases.³⁴¹ American physicians who circumcise often solicit parental consent to circumcision³⁴² even though their national medical associations do not recommend it.³⁴³ In doing so, physicians may appear to endorse circumcision. They sometimes approach uninformed parents at their most vulnerable time instead of in advance, contrary to American medical policy.³⁴⁴ Physicians may mention penile cancer, STDs, and HIV to the

336. Task Force on Circumcision, *Male Circumcision*, 130 PEDIATRICS e756, e768 (2012), <http://pediatrics.aappublications.org/content/130/3/e756.full.pdf+html>.

337. R.S. Van Howe, J.S. Svoboda, J.G. Dwyer & C.P. Price, *Involuntary Circumcision: The Legal Issues*, 83 BJU INT'L SUPP. 1, 63–73 (1999) available at <http://www.cirp.org/library/legal/vanhowe5..>

338. *Circumcision Policy Statement*, *supra* note 102, at 585.

339. COUNCIL ON SCI. AFF., SUMMARIES AND RECOMMENDATIONS OF COUNCIL OF SCI. AFF. REP. 2, 17 (1999), <http://www.ama-assn.org/resources/doc/csaph/csai-99.pdf>.

340. *Circumcision Policy Statement*, *supra* note 102 at 585.

341. *See supra* note 37; *see also supra* Part II.

342. PEDIATRICS, *supra* note 325, at 314.

343. *Circumcision Policy Statement*, *supra* note 102, at 585.

344. Alicia Gallegos, *California Doctors Back Bill to Prevent Circumcision Ban*, AM. MED. NEWS (Aug. 22, 2011), <http://www.ama-assn.org/amednews/2011/08/22/gvsc0822.htm>.

parents of newborns,³⁴⁵ which may frighten them and falsely imply that circumcision will prevent those diseases.³⁴⁶ Physicians may not mention that circumcision is a painful surgery that requires forcing the foreskin apart from the glans, or that it risks the loss of part or all of the penis, and death.³⁴⁷

The AAP has publicized its claim in 2012 that the benefits of circumcision outweigh the risks,³⁴⁸ which is false. The AAP concedes that it does not know the risks³⁴⁹ and that circumcision rarely benefits any boy or man.³⁵⁰ The AAP also fails to disclose the disadvantage that circumcision harms all boys and men.³⁵¹ Physicians introduced circumcision to America to cure masturbation by reducing pleasure,³⁵² but the AAP now contends the opposite,³⁵³ that it does not reduce pleasure. The AAP does not mention studies showing that circumcision reduces sexual pleasure,³⁵⁴ nor does it disclose that the foreskin has a sexual function.

Physicians have an ethical duty to reveal when they have made arrangements to sell a body part being removed.³⁵⁵ But one would assume that they do not explain the details to parents³⁵⁶ or that the hospital may sell the foreskins to pharmaceutical and cosmetics companies.³⁵⁷ Importantly, since 1971, medical associations and physicians who circumcise also appear to have told parents that the circumcision decision is theirs to make for religious, cultural, or personal reasons.³⁵⁸ The AAP's own Ethics

345. *Circumcision Policy Statement*, *supra* note 102, at 585.

346. *Id.*

347. *See Male Circumcision*, *supra* note 2, at e756, e774; *Circumcision Policy Statement*, *supra* note 41, at 688; Council on Scientific Affairs, *supra* note 31.

348. *See Male Circumcision*, *supra* note 2, at e756, e761. *But see Male Circumcision*, *supra* note 2, at e759, e775.

349. *See id.* at e772, e775.

350. *See id.* at e775.

351. *See id.* at e760.

352. *See* M. Fox & M. Thomson, *supra* note 35, at 464.

353. *See Male Circumcision*, *supra* note 2, at e769.

354. *Id.*; *see supra*, notes 85-93.

355. *See* *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483-85 (Cal. 1990); AMA Code of Medical Ethics, Op. 2.08, Commercial Use of Human Tissue (1994) available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion208.page?> (“(3) Human tissue and its products may not be used for commercial purposes without the informed consent of the patient who provided the original cellular material”).

356. The consent form for the surgery is likely to disclose that the tissue removed may be used or sold, but parents are unlikely to read the form carefully. *See, e.g., Univ. of Va. Health Sys.*, *supra* note 294.

357. *Id.*

358. *See Male Circumcision*, *supra* note 2, at e757, e759, e763.

Committee correctly states the opposite:³⁵⁹ that a physician's ethical and legal duty is to the child patient, regardless of his parents' beliefs.³⁶⁰ If parents can prove that their consent to circumcision was obtained by fraud, even many years earlier, they may still have viable claims against physicians and hospitals since the statute of limitations for fraud begins upon the discovery of it.³⁶¹

Parents who pay for circumcision also may have a cause of action for unfair and deceptive acts and practices under state Consumer Protection statutes that allow claims for the sale of services.³⁶² In 2008, for example, in *Reed v. ANM Health Care*³⁶³ a Washington State appeals court noted that a doctor's entrepreneurial activities fall outside the ambit of health care.³⁶⁴ In *Reed*, the court found that the physician's decision "was motivated by reasons other than her medical judgment."³⁶⁵ The court held, "if a doctor is motivated to promote an unnecessary surgery for financial gain, an injured plaintiff can pursue a claim under the Consumer Protection Act."³⁶⁶ Physicians may be motivated to perform this unnecessary, elective surgery, which medical associations generally do not recommend, for monetary gain.³⁶⁷ Parents who can prove they have been subjected to unfair and deceptive practices may, in some states, have claims under their state's Consumer Protection Act.³⁶⁸ Such claims might avoid the procedural obstacles and requirements of a medical malpractice claim, and could result in the award of multiple damages and attorneys' fees.³⁶⁹

C. Do Parents Have the Right to Make the Circumcision Decision?

Since healthy boys have the right to be left bodily and genitally intact, and physicians do not have the right to circumcise them, one does not reach the question of parents' rights in the matter. But since American medical

359. See *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, *supra* note 325.

360. *Id.*

361. See, e.g., 54 C.J.S. *Limitations of Actions* § 277 ("[T]he statute of limitations generally begins to run when the fraud is discovered or with reasonable diligence should have been discovered"). Moreover, the failure of a defrauded person to discover "fraud may be excused where there exists a fiduciary or confidential relationship between the parties."); *id.*

362. See *Reed v. ANM Health Care*, 225 P.3d 1012, 1015–1016 (Wash. Ct. App. 2008).

363. *Reed v. ANM Health Care*, 225 P.3d 1012 (Wash. Ct. App. 2008).

364. *Id.* at 1014.

365. *Id.* at 1016.

366. *Id.* at 1014.

367. See Giannetti, *supra* note 129, at 1565; *Circumcision Policy Statement*, *supra* note 41, at 691.

368. See, e.g., *Reed*, 225 P.3d at 1014.

369. See Giannetti, *supra* note 129, at 1545–46, 1566 (arguing that American trade associations may be liable for circumcision as well).

associations and some religious associations assert that parents have a religious right to cause their sons to be circumcised under the First Amendment free exercise of religion clause,³⁷⁰ and a general right to do so, it should be asked whether parental consent to non-therapeutic circumcision is legally valid.

1. Boys' Rights to Genital Integrity Supersede Their Parents' Rights

A court in Cologne, Germany addressed this question in its June 2012 decision holding that circumcision is "grievous bodily harm."³⁷¹ The court concluded that boys' rights to genital integrity supersede or trump their parents' religious and other rights.³⁷² American law compels the same conclusion. Constitutional rights in America adhere to individuals; here, they adhere to boys and men.³⁷³ Moreover, Congress made the express finding that female genital mutilation "can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law."³⁷⁴ Thus, the rights of boys and girls to remain genitally intact do not unconstitutionally abridge their parents' legal rights.

2. Parents Have a Legal Duty to Protect Their Children From Harm

Blackstone wrote that parental power over children enables them to carry out their duties, including the duty to protect their children.³⁷⁵ The British House of Lords affirmed this in 1985:

Nor has our law ever treated the child as other than a person with capacities and rights recognized by law. The principle of the law... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.³⁷⁶

In America, as well, "the duty of parents to provide for the safety and welfare of their children... has long been recognized by the common law

370. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."); *see also In re Marriage of Boldt*, 176 P.3d 388, 393 (Or. 2008) (holding that the minor son's opinion about whether to be circumcised was valid evidence in the determination of a materials change in circumstances for the consideration of custody).

371. *See* Kulish, *supra* note 24; BBC, *supra* note 25.

372. *See* Kulish, *supra* note 24.

373. *See, e.g., Adamson v. California*, 332 U.S. 46, 51 (1947) ("[T]he Bill of Rights, when adopted, was for the protection of the individual"); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

374. 18 U.S.C. § 116 (2006).

375. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *160.

376. *Gillick v. W. Norfolk AHA*, [1985] UKHL 7, [1986] A.C. 112.

and by statute.”³⁷⁷ Parents “have the duty to take every step reasonably possible... to prevent harm to their children.”³⁷⁸ For example, parents cannot consent to their child’s participation in non-therapeutic research in which there is any risk of injury or damage to health.³⁷⁹ Both the common law and child abuse statutes prevent parents from endangering or injuring their children other than for a valid medical purpose.³⁸⁰ Thus, parents are required by law to protect their sons from the risks of, and the harm caused by, circumcision.

3. Parents Have No Religious or Other Right to Order Circumcision

Parents have a complete right to freedom of religious belief, and the right to bring up their children in their own religion.³⁸¹ Nonetheless, laws do not violate the free exercise of religion clause so long as they are valid, neutral, and generally applicable.³⁸² For example, Native American Indians cannot smoke the illegal drug peyote in religious ceremonies.³⁸³ The Supreme Court prohibited polygamy in *Reynolds v. United States*, explaining that to rule otherwise would be to “make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”³⁸⁴ Parents do not own their children or have the unfettered right to control their lives and bodies; this would constitute slavery, which was abolished by the 13th Amendment to the United States Constitution.³⁸⁵

As Ross Povenmire wrote, parents cannot risk harming their children or harm them for religious reasons.³⁸⁶ The Supreme Court stated in *Wisconsin*

377. *North Carolina v. Walden*, 293 S.E.2d 780, 786 (N.C. 1982).

378. *Id.*

379. *See Grimes v. Kennedy Krieger Inst., Inc.*, 782 A.2d 807, 856 (Md. 2001).

380. *See, e.g., Connecticut v. Maurice M.*, 975 A.2d 90, 101 (Conn. App. Ct. 2009) (“parents have a common-law duty to protect their children”); *In re S.D.*, 204 P.3d 1182, 1188 (Kan. Ct. App. 2009) (“parents have a natural, as well as common-law, duty to protect their children from abuse”); *see also supra*, Part III.A.3.a (discussing the child abuse statutes).

381. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925)).

382. *See Huffman v. Alaska*, 204 P.3d 339, 344 (Alaska 2009) (holding the state can require parents to allow tuberculosis test on child over religious objection).

383. *See Remy Maldigian, Unequal Rites: Peyote Sacraments and the First Amendment*, IN THESE TIMES (Jan. 11, 2012), http://www.inthesetimes.com/article/12429/unequal_rites_peyote_sacraments_and_the_first_amendment.

384. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

385. U.S. CONST. amend XIII, § 1.

386. Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States*,

v. *Yoder* that parental discretion may be challenged “if it appears that the parental decision will jeopardize the health and safety of the child”.³⁸⁷ In *Prince v. Massachusetts* in 1944,³⁸⁸ the controlling case, parents asked their children to distribute religious pamphlets on highways which was in violation of a state statute. Finding the statute constitutional despite the freedom of religion clause, the Supreme Court famously stated:

The right to practice religion freely does not include liberty to expose the... child to ill health or death.... The catalogue [of possible harms] need not be lengthened.... [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare, [including] matters of conscience and religious conviction.... Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury.... Parents may be free to become martyrs themselves. But [they may not] make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.³⁸⁹

The *Prince* decision suggests that parents do not have the legal right to order the circumcision of their children for religious reasons. The surgery not only risks ill health and death but is certain to cause physical injury,³⁹⁰ and possibly psychological injury as well.³⁹¹ *Prince* also makes clear that parents cannot force their children to undertake potentially harmful activities before their children become old enough to make an informed choice for themselves.³⁹² In *State v. Baxter*, a Washington case decided in 2006, the court concurred with the holding in *Prince*:

Both corporal punishment and religious practice are grounded in the parents’ beliefs as to the best interests of the child, and as parental control over the child’s upbringing does not justify cutting the child as punishment, it does not justify cutting the child as a religious exercise.³⁹³

7 AM. U. J. GENDER, SOC. POL’Y & L. 87, 88–89 (1999).

387. *Wisconsin*, 406 U.S. at 234.

388. *Prince v. Massachusetts*, 321 U.S. 158, 159–162; accord *People in Interest of D.L.E.*, 645 P.2d 271 (1982).

389. *Prince*, 321 U.S. at 166–167, 170; see also Am. Acad. of Pediatrics, *Religious Exemptions from Child Abuse Statutes*, 81 PEDIATRICS 169, 170–171 n. 2 (1988) (“[P]arents may not martyr their children based on parental beliefs”) (citing *Prince*, 321 U.S. 158).

390. See *supra* Part I.E.

391. See *Andrews*, 498 F. Supp. at 1047 (“[Medical treatment] decision[s] can either produce or eliminate physical, psychological, and emotional ruin.”).

392. *Prince*, 321 U.S. 170.

393. *State v. Baxter*, 141 P.3d 92, 99 (Wash. App. 2006).

Thus, parents do not have the right to circumcise their sons for religious reasons.

4. Parents Can Only Consent to Medical Care

Just as physicians cannot perform unnecessary surgery on children, parents cannot consent to it.³⁹⁴ In 1979, a Texas appeals court considered whether parents could consent to remove and transplant a kidney from a daughter to a son to save his life, and held that they could not.³⁹⁵ The court noted that the power of parents to consent is limited to medical and surgical treatment.³⁹⁶ The court defined treatment as “the steps taken to effect a cure of an injury or disease... including examination and diagnosis as well as application of remedies.”³⁹⁷ Similarly, in *Williamson v. State*, a court found a mother guilty of felonious assault for requesting unnecessary surgery that injured her child.³⁹⁸ The American Academy of Pediatrics Committee on Bioethics agrees that parents can only give informed consent for the diagnosis and treatment of children, adding that it should be with assent of the child whenever appropriate.³⁹⁹ This is inconsistent with the 2012 AAP Task Force on Circumcision’s claim that parents have the right to make the circumcision decision.⁴⁰⁰ No doubt parents can consent to safe, effective preventive medicine, such as eye drops for newborns, but they cannot consent to unnecessary surgery that is ineffective in preventing disease.

5. Parents Must Act in Their Sons’ Best Interests

Even if circumcision had a valid medical basis, and parents had the right, as proxies, to make the circumcision decision, they would still be required by law, like physicians, to act in the best interests of their sons.⁴⁰¹ As Steven Svoboda writes, “[s]urrogates are expected to make decisions *based on what the incompetent patient would want for himself[.]*” “[i]t must be shown to a reasonable degree of certainty that *the child would*, upon attainment of the age of reason, *have desired the surgery for himself*.”⁴⁰² As discussed above, men rarely choose circumcision for themselves, and

394. AMA Code of Medical Ethics, Rule 2.19.

395. *Little v. Little*, 576 S.W.2d 493, 494, 500 (Tex. Civ. App. 1979).

396. *Id.* at 495.

397. *Id.*

398. *Williamson v. State*, 356 S.W.3d 1, 14 (Tex. App. 2010).

399. *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, *supra* note 325, at 314.

400. *Circumcision Policy Statement*, *supra* note 41, at 585.

401. J.S. Van Howe et al., *Involuntary Circumcision: The Legal Issues*, 83 BJU INT’L 63, 64, (1999).

402. *Id.* at 65, 70 (emphasis added).

circumcision violates the best interests rule. The best interests rule also prohibits parents from making the circumcision decision for reasons such as religious belief or aesthetic preference which have nothing to do with their son's health.⁴⁰³

6. Parents Rarely Give Fully Informed Consent

Since parents do not have the right to make the circumcision decision, one does not reach the question of whether their consent is fully informed, as the law requires.⁴⁰⁴ Before 1971, physicians reportedly often circumcised newborn boys without parental consent.⁴⁰⁵ All such operations constituted an unlawful battery.⁴⁰⁶ Physicians may fail to obtain fully informed consent to circumcision today, as well. For example, it is unlikely that physicians inform parents that the operation can be fatal⁴⁰⁷ or prevents normal sexual function.⁴⁰⁸ If physicians told parents the truth about the surgery, it is unlikely that roughly half of parents would agree to it, as they do today, except perhaps on religious grounds.⁴⁰⁹

D. Ancillary Legal Issues

The analysis above allows these ancillary issues to be resolved quickly.

1. Is It Lawful to Use Medicaid to Pay For Circumcision?

Since 1965, tens of millions of boys have been circumcised under the jointly federal and state funded Medicaid program.⁴¹⁰ The fundamental principle of Medicaid law, however, repeated throughout the federal and state Medicaid statutes and regulations,⁴¹¹ and affirmed by the United States Supreme Court,⁴¹² is that Medicaid only covers necessary medical services.⁴¹³ Moreover, medical services must be reasonable and effective,

403. *Id.* at 68.

404. *See* *Todd v. United States*, 570 F. Supp. 670, 678 (D.S.C. 1983).

405. *See* Paul M. Fleiss, *The Case Against Circumcision*, MOTHERING: THE MAGAZINE OF NATURAL FAMILY LIVING, Winter 2007, available at <http://www.mothering.com/community/a/case-against-circumcision>.

406. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

407. *Bollinger*, *supra* note 74.

408. *See* *Frisch*, *supra* note 85.

409. *See generally* *Svoboda*, *supra* note 239, at 61.

410. *Cf. Medicaid Funding for Circumcision*, CIRCUMCISION RESOURCE CTR., <http://www.circumcision.org/medicaid.htm> (last visited March 6, 2013) (listing states in which Medicaid does not fund circumcision). *See generally* Peter W. Adler, *Is It Lawful to Use Medicaid to Pay for Circumcision?*, 19 J.L. & MED. 335, 335–36 (2011).

411. *Adler*, *supra* note 410, at 336.

412. *Id.* at 343 n. 89.

413. *Id.* at 336.

and the least costly alternatives must be used whenever available.⁴¹⁴ Surgery is covered only after a physician or surgeon has diagnosed an illness or disease, and has determined that the surgery will be effective and is the only available treatment.⁴¹⁵ Unnecessary, elective, cosmetic surgery is not covered.⁴¹⁶ It has been unlawful since 1965 for physicians and hospitals to claim Medicaid reimbursement from the federal and state governments for circumcisions.⁴¹⁷ Every such claim is a false claim against the federal and state governments, and is subject to severe penalties.⁴¹⁸ In urging Medicaid coverage of circumcision,⁴¹⁹ the AAP is advocating breaking the law.

2. Is It Lawful For Companies to Buy and Sell Boys' Foreskins?

Given that boys have a right to genital integrity, that physicians cannot lawfully operate on healthy children,⁴²⁰ and that parental consent to circumcision is legally invalid, hospitals do not own the foreskins that they amputate. They are the property of the boys from whom they are unlawfully taken. Accordingly, hospitals cannot lawfully sell foreskins to pharmaceutical, cosmetics, or other companies, and the boys and men whose foreskins have been converted have claims against those companies.

3. Can Physicians' Trade Associations Be Held Liable For Circumcision?

In 2000, Matthew Giannetti considered whether the American Academy of Pediatrics could be subject to trade association liability for its 1989 report on circumcision.⁴²¹ He argued that trade association liability may be predicated on section 324A of the Restatement (Second) of Torts, which allows for the imposition of liability upon a trade association for gratuitous services, such as professional standard setting, if the association renders

414. *Id.* at 344.

415. *Id.*

416. *Id.*

417. *Id.* at 343.

418. *Id.* at 344.

419. *Male Circumcision*, *supra* note 2, at 585; Am. Acad. of Pediatrics Task Force on Circumcision, *Technical Report: Male Circumcision*, 130 PEDIATRICS e756, e777 (2012) ("Hospitals in states where Medicaid covers routine newborn male circumcision have circumcision rates that are 24% higher than hospitals in states without such coverage Financial barriers that prevent parents from having the choice to circumcise their male newborns should be reduced or eliminated The preventive and public health benefits associated with newborn male circumcision warrant third-party reimbursement of the procedure").

420. *See supra*, Part III.B.2.

421. *See generally* Giannetti, *supra* note 129.

those services negligently.⁴²² Giannetti cited the 1996 New Jersey Supreme Court case of *Snyder v. American Association of Blood Banks*, which held a blood bank trade association liable to the recipient of blood platelet transfusions who contracted AIDS.⁴²³ The court found that “[b]y words and conduct, the AABB [American Association of Blood Banks] invited blood banks, hospitals, and patients to rely on the AABB’s recommended procedures.”⁴²⁴ Thus the court held that the American Association of Blood Banks (“AABB”) owed a duty of care to individuals like Snyder, because it was foreseeable that blood banks would follow the AABB’s recommended procedures.⁴²⁵ In addition, the court also found that at the time of Snyder’s transfusions, ample evidence existed that blood products could transmit AIDS, and, therefore, the AABB was negligent.⁴²⁶

The American Academy of Pediatrics intends that hospitals, physicians, and parents (as well as the media, legislators and Medicaid officials) will rely upon its 2012 circumcision policy report.⁴²⁷ Many of the AAP’s assertions in the report appear to be false or misleading. These include especially the assertion that the benefits of circumcision exceed the risks,⁴²⁸ that parents have the right to make the circumcision decision,⁴²⁹ and that Medicaid should pay for it,⁴³⁰ and also the claims that the circumcision is relatively painless,⁴³¹ that the risks are low,⁴³² and that circumcision does not affect sexual function.⁴³³ Accordingly, hospitals, physicians, parents, and men may have claims against the AAP (and the American Congress of Obstetricians and Gynecologists, which endorsed the 2012 AAP report) for trade association liability.⁴³⁴

422. *Id.* at 1513 nn. 24–25.

423. *Snyder v. Am. Ass’n of Blood Banks*, 676 A.2d 1036, 1036 (N.J. 1996).

424. Giannetti, *supra* note 150, at n. 28.

425. *Id.* at n.29.

426. *Id.* at n.30.

427. See *Circumcision Policy Statement*, *supra* note 41, at 585. Indeed, the AAP issued *Circumcision Speaking Points* for members. See *supra* note 103.

428. See Part I.G, *supra*.

429. See Part III.C, *supra*.

430. See Part III.D.1, *supra*.

431. *Male Circumcision*, *supra* note 2, at e757. (“Analgesia is safe and effective in reducing the procedural pain associated with newborn circumcision.”).

432. See *Circumcision Policy Statement*, *supra* note 41.

433. See *Male Circumcision*, *supra* note 2, at e769.

434. *New Evidence Points to Greater Benefits of Infant Circumcision, But Final Say Is Still Up to Parents, Says AAP*, AM. ACAD. OF PEDIATRICS (Aug. 27, 2012), <http://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAP-Press-Room.aspx> (types “new evidence points” into the search bar, follow first search result).

III. REMEDIES

A. Rights

As shown, circumcision violates the rules of medical ethics and numerous provisions of law. Boys and men are entitled to full redress. First, as the American Medical Association has stated, regulatory agencies are required to take allegations of unethical conduct very seriously.⁴³⁵ Unnecessary surgery on children is a serious ethical violation.⁴³⁶ Physicians who circumcise should lose their licenses to practice medicine. Second, the federal and state child abuse statutes protecting children from harm and the criminal assault laws must be enforced. The penalty for violating these laws is imprisonment. Third, the federal and state statutes protecting girls from non-therapeutic circumcision must be extended to boys. The proposed federal law that would allow circumcision,⁴³⁷ and laws blocking remedies, such as statutes of repose, would violate boys' rights and be invalid as unconstitutional. Fourth, federal and state Medicaid officials, legislators, and attorneys general all have the legal duty to end Medicaid funding of circumcision. Fifth, since physicians and hospitals do not have the legal authority to take boys' foreskins, they do not have the right to sell them, nor do the buyers, including pharmaceutical and cosmetics companies, have the right to use them.

B. Reality

The reality is that regulatory, criminal, administrative, and legislative remedies have not been forthcoming for properly performed circumcision. Newborn boys cannot speak or vote, while physicians' associations and religious organizations can (and do) lobby legislators, contribute to campaigns, and put pressure on Medicaid officials. For example, in 2010, a Jewish senator in Massachusetts wrote to her constituents that she had blocked a bill from leaving her committee, which would have allowed only therapeutic circumcision.⁴³⁸ In 2011, the president of the American Medical Association stated that the AMA would block all efforts to limit non-therapeutic circumcision,⁴³⁹ a statement at odds with the official AMA

435. See Part III.D.3, *supra*.

436. See AM. UROLOGICAL ASS'N CODE OF ETHICS, *supra* note 312.

437. See H.R. 2400, *supra* note 26.

438. See *State Senate Cuts Bill to Ban Circumcision*, UNIVERSAL HUB, <http://www.universalhub.com/2010/state-senate-cuts-bill-ban-circumcision> (last visited Nov. 14, 2012).

439. See Alicia Gallegos, *California Doctors Back Bill to Prevent Circumcision Ban*, AM. MED. NEWS (Nov. 14, 2012, 8:25 PM), <http://www.ama-assn.org/amendnews/2011/08/22/gvsc0822.htm> ("American Medical Association policy strongly opposes interference by the government or other third parties that

policy that the “data are not sufficient to recommend routine [neonatal circumcision].”⁴⁴⁰ Physicians’ trade associations may also have influenced states to continue Medicaid coverage (when asked why they are continuing coverage, Medicaid officials uniformly respond by using medical terms).⁴⁴¹ Representatives of the American Academy of Pediatricians, having argued recently that Medicaid should cover circumcision,⁴⁴² may be trying to persuade the states that have ended Medicaid coverage to reinstate it, contrary to law.

C. Remedies

Circumcision, one of the most common surgeries in American hospitals, will continue until public opinion has turned completely against it, or until courts rule, as in Germany, that circumcision is unlawful. The constitutional right of access to the courts guarantees every American speedy, adequate, effective, and meaningful judicial remedies.⁴⁴³ Judges are sworn to uphold the Constitution and to grant those remedies. The 2012 German decision, this article, and those it cites, provide a blueprint for courts to hold physicians, hospitals, and parents liable to men for properly performed circumcisions.

CONCLUSION

This article has addressed whether circumcision is legal, and has shown that it is not. To summarize the law,⁴⁴⁴ boys, like girls and adults, have absolute rights under the common law to personal security and bodily integrity, and to freedom or the autonomy to make important and irreversible decisions about their bodies that can be delayed, like circumcision, for themselves.⁴⁴⁵ It is unconstitutional to protect girls from unnecessary genital cutting without extending equal protection of the law to boys.⁴⁴⁶ In addition, boys and girls are protected from circumcision by the criminal child abuse statutes,⁴⁴⁷ tort law,⁴⁴⁸ and human rights law.⁴⁴⁹

‘causes a physician to compromise his or her medical judgment as to what information or treatment is in the best interest of the patient.’”).

440. AM. MED. ASS’N, *supra* note 31, at 17.

441. *See generally* Adler, *supra* note 153.

442. *See* Sasha Emmons, AAP: *Health Benefits of Circumcision Outweigh the Risks*, CNN HEALTH, (Aug. 27, 2011), <http://www.cnn.com/2012/08/27/health/aap-circumcision-recommendation/index.html>.

443. *Koutny v. Martin*, 530 F. Supp. 2d 84, 90 (D.D.C. 2007).

444. *See supra* Part III.

445. *See supra* Part III.A.1.

446. *See supra* Part III.A.2.a.

447. *See supra* Part III.A.3.

448. *See supra* Part III.A.4.

One therefore does not reach the argument that physicians have the right to circumcise boys for religious, cultural, or personal reason, but if one did, it does not pass the blush test. A physician's legal duty is to provide competent medical care to pediatric patients independent of their parents' desires.⁴⁵⁰ Thus, physicians cannot take orders from parents to operate on children for reasons having nothing to do with medicine. Parents' religious rights in turn are subordinate to their sons' absolute rights to genital integrity and autonomy,⁴⁵¹ and parents cannot risk harming their children, let alone actually harm them for religious reasons.⁴⁵² Furthermore, physicians and parents have a legal duty to *protect* boys from circumcision.⁴⁵³

This leaves the argument that circumcision is legally justified because it is preventive medicine. As the ethicist Margaret Somerville has written, it is a common error to believe that this justifies circumcision.⁴⁵⁴ Amputating any body part would have medical benefits but would violate the rights of the child.⁴⁵⁵ Circumcision also does not benefit the vast majority of boys or men at all (*e.g.*, at best it reduces the risk of HIV during unsafe sex), and any benefits can be achieved easily and more effectively without it.⁴⁵⁶ The ethical and legal rule is that physicians cannot operate on healthy children.⁴⁵⁷ Amputations are legally justified only when medically

449. See *supra* Part III.A.5.

450. See *supra* Part III.B.4.

451. See, *e.g.*, *German Court Rules Circumcision Is "Bodily Harm"*, BBC NEWS EUROPE (June 26, 2012), <http://www.bbc.co.uk/news/world-europe-18604664>; N. Kulish, *GERMAN RULING AGAINST CIRCUMCISING BOYS DRAWS CRITICISM*, N.Y. TIMES (June 26, 2012), <http://www.nytimes.com/2012/06/27/world/europe/german-court-rules-against-circumcising-boys.html>.

452. See *supra* notes 385-92.

453. *Id.*

454. MARGARET SOMERVILLE, *THE ETHICAL CANARY: SCIENCE, SOCIETY AND THE HUMAN SPIRIT* 202-19 (2000).

A common error made by those who want to justify infant male circumcision on the basis of medical benefits is that they believe that as long as some such benefits are present, circumcision can be justified as therapeutic, in the sense of preventive health care. This is not correct. A medical-benefits or "therapeutic" justification requires that overall the medical benefits sought outweigh the risks and harms of the procedure required to obtain them, that this procedure is the only reasonable way to obtain these benefits, and that these benefits are necessary to the well-being of the child. None of these conditions is fulfilled for routine infant male circumcision. If we view a child's foreskin as having a valid function, we are no more justified in amputating it than any other part of the child's body unless the operation is medically required treatment and the least harmful way to provide that treatment.

455. See *supra* Part III.A.

456. See *supra* Part III.G. UTIs can be treated with antibiotics. Infants are not at risk of penile cancer, which can be prevented by proper hygiene, or of STDs, which can be prevented easily and effectively by abstinence, monogamy, or safe sex.

457. See *supra* Part III.B.

necessary to treat serious medical conditions,⁴⁵⁸ after a diagnosis and recommendation that the surgery is likely to be effective, cannot be delayed, that its benefits will outweigh the risks and harm, and that all other efforts to treat the disease have failed.⁴⁵⁹ Moreover, physicians and parents would need to prove that the surgery is in the best interests of the child, which includes proving that the child, if able, would have chosen the surgery for himself.⁴⁶⁰ Circumcision fails all of these tests. In short, under any analysis, circumcision is illegal.

458. *Id.*

459. *See supra* Part III.B.

460. *See supra* Part III.B.6.

WHOSE CHOICE ARE WE TALKING ABOUT? THE EXCLUSION OF STUDENTS WITH DISABILITIES FROM FOR- PROFIT ONLINE CHARTER SCHOOLS

*Matthew D. Bernstein****

I am a strong believer in testing. I believe the public is spending a lot of money on education, and they've got a right to know what the schools are doing and what the schools are not doing. They are not getting that today with the tests that are out there.

—Albert Shanker, founder of the charter school movement, 1988⁴⁶¹

The development of common standards and shared assessments radically alters the market for innovation in curriculum development, professional development, and formative assessments. Previously, these markets operated on a state-by-state basis, and often on a district-by-district basis. But the adoption of common standards and shared assessments means that education entrepreneurs will enjoy national markets where the best products can be taken to scale.

—Joanne Weiss, Chief of Staff, Secretary of Education Arne Duncan, 2011⁴⁶²

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⁴⁶¹ Albert Shanker, President, Am. Fed'n of Teachers at the Nat'l Press Club (Mar. 31, 1988).

⁴⁶² Joanne Weiss, *The Innovation Mismatch: "Smart Capital" and Education Innovation*, HARVARD BUS. REVIEW BLOG (Mar. 31, 2011, 8:00 AM), <http://blogs.hbr.org/innovations-in-education/2011/03/the-innovation-mismatch-smart.html>.

I. INTRODUCTION: THE LIMITATIONS OF SCHOOL CHOICE

It is hardly controversial to say that the public education system in the United States is badly in need of change.⁴⁶³ Parents, teachers, politicians, and students share a view that our schools are inadequate, under-funded, and performing poorly, even while they may disagree about solutions.⁴⁶⁴ Test scores are declining, schools are facing funding shortages, and age-old problems like truancy, poverty, and declining facilities seem to be getting worse, not better.⁴⁶⁵ The United States, once a worldwide leader in educational achievement, has seen its reading scores for fifteen-year-olds sink to seventeenth internationally, behind Estonia and Poland—and that is the nation's *best* result in the three-subject test.⁴⁶⁶ In science and math, the United States has fallen out of the top twenty, and in the case of math, the country is now a below-average nation.⁴⁶⁷ Nobody who is serious about our educational system would be willing to accept these results.

The need to reform education increasingly inhabits the public conscience through movies, editorials, and the news cycle.⁴⁶⁸ More and more, these sources point to charter schools as the locus from which the next generation of schools will emerge. As No Child Left Behind⁴⁶⁹ (“NCLB”) is replaced by market-inspired government initiatives like Race to the Top⁴⁷⁰ and innovations from the private sector, there is a great divide emerging in public education. On one side stand the established holders of the torch, the traditional public schools that, since the nineteenth century, have comprised the core of public education. On the other are charter school reformers, the creative innovators allergic to the status quo who want to shake up the

⁴⁶³ This paper limits its focus to grades K-12, or primary and secondary education. Higher education is simply outside the focus here.

⁴⁶⁴ See, e.g., Joe Nocera, *How to Fix the Schools*, N.Y. TIMES, Sept. 18, 2012, <http://www.nytimes.com/2012/09/18/opinion/nocera-how-to-fix-the-schools.html>.

⁴⁶⁵ See Linda Darling-Hammond, *Education and the Income Gap*, WASH. POST, Apr. 27, 2012, http://www.washingtonpost.com/blogs/answer-sheet/post/education-and-the-income-gap-darling-hammond/2012/04/26/gIQAhn0LkT_blog.html.

⁴⁶⁶ See Sam Dillon, *Top Test Scores From Shanghai Stun Educators*, N.Y. TIMES, Dec. 7, 2010, <http://www.nytimes.com/2012/12/07/education.html>.

⁴⁶⁷ See *id.*

⁴⁶⁸ The most influential and controversial recent example is WAITING FOR SUPERMAN (Electric Kinney Films 2010); see also Johanna Sorrentino, “Waiting for Superman”: What It Means for You and Your Child, EDUCATION.COM, <http://www.education.com/magazine/article/waiting-superman-means-parents/>.

⁴⁶⁹ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6301 (2006)).

⁴⁷⁰ See U.S. Dep’t of Educ., *Race to the Top Program Executive Summary* (2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

system from the inside and build a new one in its place. As the debate over the best form of public education increasingly fuels the ongoing struggles between public unions and the private sector, between free-market ideals and the social safety net, and between federal, state, and local control, education in the United States is being pulled apart. Left in the gap are the young people for whom the system is supposedly designed, those who stand to benefit most from a high quality public education.

In the last fifteen years, information technologies have fostered the emergence of a new kind of school: the fully online “cyber” or “virtual” charter. These schools, operated almost exclusively by for-profit, private companies that are traded publicly on the stock market, are growing rapidly.⁴⁷¹ The number of virtual schools nationwide has increased from seventeen in the 2003-2004 school year to seventy-nine in 2010-2011.⁴⁷² The majority of states now allow students to obtain some of their education online.⁴⁷³ The companies that run these schools do not hide the fact that profits are their top priority.⁴⁷⁴ Indeed, it is not hard to see why the corporate business world envisions a huge opportunity in public education: today, spending on education totals more than one trillion dollars,⁴⁷⁵ and K12, Inc., the leader in privatized online education, estimates that the market for its schools is valued at \$15 billion.⁴⁷⁶ The second biggest purveyor of online schools was recently bought for \$400 million⁴⁷⁷ by Pearson Education, Inc., whose market capitalization is valued at approximately \$14.39 billion.⁴⁷⁸ The purveyors of online schools tout their

⁴⁷¹ Gary Miron & Jessica L. Urschel, *Understanding and Improving Full-Time Virtual Schools: A Study of Student Characteristics, School Finance, and School Performance in Schools Operated by K12 Inc.*, NATIONAL EDUCATION POLICY CENTER (July, 2012), <http://nepc.colorado.edu/files/nepcbrk12-miron.pdf>.

⁴⁷² Gary Miron et al., *Profiles of For-Profit and Nonprofit Education Management Organizations: Thirteenth Annual Report, 2010-2011*, NATIONAL EDUCATION POLICY CENTER (Jan. 2012), <http://nepc.colorado.edu/publication/EMO-profiles-10-11> [hereinafter Miron et al.]. 2003-2004 is the first year for which cyber charter data is available, while 2010-2011 is the most recent data available. *Id.*

⁴⁷³ Edward Lin, “Virtual” Schools: Real Discrimination, 32 SEATTLE U. L. REV. 177, 177 (2008).

⁴⁷⁴ See generally K12’s CEO Discusses F1Q 2013 Results - Earnings Call Transcript, SEEKING ALPHA (Nov. 9, 2012, 8:00 AM), http://seekingalpha.com/article/994861-k12-s-ceo-discusses-f1q-2013-results-earnings-call-transcript?source=email_rt_mc_focus&ifp=0.

⁴⁷⁵ U.S. Census, Table 216: School Expenditures By Type of Control and Level of Instruction In Constant (2008-2009) Dollars: 1980 to 2009, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, <http://www.census.gov/compendia/statab/2011/tables/11s0216.pdf>.

⁴⁷⁶ Stephanie Saul, *Profits and Questions at Online Charter Schools*, N.Y. TIMES, Mar. 13, 2010, http://www.nytimes.com/2011/12/13/education/online-schools-score-better-on-wall-street-than-in-classrooms.html?pagewanted=all&_r=1&.

⁴⁷⁷ *Id.*

⁴⁷⁸ NYSE: PSO, GOOGLE FINANCE, <http://www.google.com/finance?chdnp=1&chdd=1&chds=1&chdv>

innovative approach to public education as an asset and they enjoy considerable support from the education establishment.⁴⁷⁹ Citing many states' recent voluntary adoption of the Common Core Standards—an attempt to standardize educational goals across all fifty states—Joanne Weiss, Chief of Staff for Secretary of Education Arne Duncan, championed the notion that “education entrepreneurs will enjoy national markets where the best products can be taken to scale.”⁴⁸⁰

But the recent increase in the number of fully online schools exemplifies the costs as well as the benefits of privatized education. As in the consumer finance industry, where the development of derivatives moved faster than the ability of regulators to ensure their safety, the virtual education world is largely unregulated.⁴⁸¹ Very few states have passed legislation directed specifically at online charter schools, and this absence of oversight has caught the attention of legislators.⁴⁸² In the 2010-2011 school year, only 27.7% of for-profit virtual schools met Adequately Yearly Progress (“AYP”), the main measure of student achievement under NCLB.⁴⁸³ This shocking figure was almost half the percentage of privately-run, brick-and-mortar schools, where 52% met AYP.⁴⁸⁴ Schools managed by for-profit companies also fared worse than those managed by not-for-profits.⁴⁸⁵ Only one-third of students at K12, Inc., the biggest purveyor of private education, achieved AYP.⁴⁸⁶

Average achievement based on test scores, especially under the nearly obsolete standards of NCLB, is only one concern regarding online public schools. Another is special education. While all charter schools are by definition exempt from many district and state requirements, they are not excused from obeying federal law regulating special education. There is a growing rift between the complex responsibilities all public schools owe to

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⁴⁷⁹ See John Watson & Jennifer Ryan, *Keeping Pace with K-12 Online Learning: A Review of State-Level Policy and Practice*, NORTH AMERICAN COUNCIL FOR ONLINE LEARNING 6 (Nov. 2007), <http://www.inacol.org/research/docs/KeepingPace07-color.pdf>.

⁴⁸⁰ Weiss, *supra* note 2.

⁴⁸¹ See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

⁴⁸² Meghan Knight, *Cyber Charter Schools: An Analysis of North Carolina's Current Charter School Legislation*, 6 N.C. J. L. & TECH. 395, 400–01 (2005) (noting that California, Colorado, Ohio, and Pennsylvania passed legislation regulating charters and Tennessee banned them outright).

⁴⁸³ Miron & Urschel, *supra* note 11, at v.

⁴⁸⁴ Alexandra Usher et al., *AYP Results for 2010-11*, CENTER ON EDUCATION POLICY 4 (2011), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=386> (identifying a 52% national average for 2010-2011).

⁴⁸⁵ Miron et al., *supra* note 12, at v.

⁴⁸⁶ *Id.* at 21–22; Saul, *supra* note 16, at A1.

students with disabilities and the identity of charter schools as independent, efficient, and results-driven. These problems are further exacerbated in for-profit, online schools. Over the past decade, clear and convincing evidence has emerged that for-profit charter schools are not adequately maintaining their fiscal and educational responsibilities to students with disabilities.⁴⁸⁷ While the lack of transparency maintained by most for-profit education companies has made gathering data difficult, it is apparent that online schools are both knowingly and unknowingly discriminating against students with severe disabilities.⁴⁸⁸ According to a variety of sources, the profit motive at online schools incentivizes them to do whatever they can to avoid serving the students who cost the most to educate.⁴⁸⁹ Chief among these are students with severe disabilities. As one special education scholar put it, “[t]he fewer disabled students a charter school enrolls, the greater its autonomy, the lower its costs, the higher its performance on statewide assessments, and the less bureaucratic red-tape it must deal with.”⁴⁹⁰ In principle, this kind of discrimination is akin to racial bigotry and is broadly illegal.⁴⁹¹ It threatens not just cyber charter schools, but also the development of the American public school system as a whole.

By examining the history of special education law against the emergence of the for-profit and online education movements, this paper explores the charter school movement from a consumer law perspective. It aims to explain why much of the current debate over test scores, “accountability,” and teacher evaluation obscures other systemic fault lines that implicate the very reasons we have a public education system in the first place. In turn, the goal is to suggest solutions to some fundamental questions: in the twenty-first century, do we still need a public education system? What are our collective responsibilities to students? What does a quality education mean, and how do we maintain access to it?

⁴⁸⁷ See Educ. Law Ctr., *Charter Schools in Pennsylvania – Frequently Asked Questions*, <http://www.elc-pa.org/pubs/downloads/english/chaCharter%20Schools%20in%20PA%20%20Frequently%20Asked%20Updated%208-08.pdf>.

⁴⁸⁸ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 6 (2012), available at <http://www.gao.gov/products/GAO-12-543>.

⁴⁸⁹ Lin, *supra* note 13, at 184, 187; see Miron & Urschel, *supra* note 11, at 27; Nancy J. Zollers & Arun K. Ramanathan, *For-Profit Charter Schools and Students with Disabilities: The Sordid Side of the Business of Schooling*, 80 PHI DELTA KAPPAN 297, 301 (1998).

⁴⁹⁰ Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 689 (2012).

⁴⁹¹ See Mark C. Weber, *Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, 11 LOY. J. PUB. INT. L. 217, 240–41 (2010).

II. PUBLIC EDUCATION AND SCHOOL CHOICE AS CONSUMER LAW

It is surprising that public education is rarely thought of as a branch of consumer law, given the long-running tendency of education scholars, advocates, and the private education industry to apply the language and concepts of business to the field. Perhaps this is because, while the term “consumer” is used in a wide variety of social contexts, there is not a single authoritative definition. In 2012, it may be harder to say who is *not* a consumer than who is. The Consumer Financial Protection Bureau describes a consumer simply as an “individual.”⁴⁹² Another common definition can be found in the Illinois Consumer Fraud and Deceptive Practices Act, which defines a consumer as “any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.”⁴⁹³ The provision of educational services fits comfortably within these definitions.

Consumer *law* is generally defined as protections to purchasers of goods and services.⁴⁹⁴ Most often, consumer protections occur in the form of government mandated disclosures (on, say, credit card statements), but they also take the form of legislation restricting certain business practices viewed as systemically harmful to consumers.⁴⁹⁵ The recent creation of the Bureau of Consumer Financial Protection, designed to prevent future abusive lending practices of the kind that led to the financial crash of 2008, is one example.⁴⁹⁶ One legal services website defines consumer law as “regulating many of the following business transactions and practices: advertising, sales and business practices; product branding; mail fraud; sound banking and truth in lending; quality produce and meats; housing material and other product standards.”⁴⁹⁷ Public education, increasingly viewed as a “product,” fits among these definitions. Scholars increasingly use terms such as “supply-side” economics, “market-based ideas of

⁴⁹² FED. FIN. INST..EXAMINATION COUNCIL, CFPB CONSUMER LAWS AND REGULATIONS 2 (2011), <http://thedebtcollectiondrill.com/tcd/wp-content/uploads/2012/06/FCRA.pdf>.

⁴⁹³ Illinois Consumer Fraud and Deceptive Practices Act, ILL. COMP. STAT. 815 § 505/1 (2007) (Merchandise includes “intangibles” and “services.”).

⁴⁹⁴ See BLACK’S LAW DICTIONARY 359 (9th ed. 2009).

⁴⁹⁵ See Bar-Gill & Warren, *supra* note 21, at 83–84, 90.

⁴⁹⁶ 12 U.S.C. § 5491 (Supp. V 2006).

⁴⁹⁷ Global Legal Res., *Customer Protection Law*, HG.ORG, <http://www.hg.org/consume.html> (last visited Mar. 31, 2013).

competition,” and “shopping for schools” to describe public education today.⁴⁹⁸

Economist Milton Friedman first broached the idea that the private sector should involve itself in education. His 1955 article, *The Role of Government in Education*, called the federal presence in education “an indiscriminate extension of governmental responsibility.”⁴⁹⁹ Friedman argued that there was an appropriate place for government in *financing* public education, as it promoted “a stable and democratic society,” but he thought that it was inappropriate for the government to *administer* schools themselves.⁵⁰⁰ The federal government should give money to parents in the form of vouchers, Friedman posited, and parents should then decide where to spend it.⁵⁰¹ Friedman’s theory applied a classical free-market conception to public education; no one had previously proposed such a dramatic role for the private sector in schools. Under Friedman’s ideas, schools would (and *should*) compete among each other for students.⁵⁰² Those who offered inferior products (curriculum, support, activities) would not draw students/customers, and would therefore fold.⁵⁰³ This was exactly the point: if a company was offering a low quality product, it should not be in business at all, let alone receive government money for its efforts.

Friedman’s notions of how the public school system should work, conceived over fifty years ago, essentially describe the way public education increasingly appears in the United States today. He envisioned a system in which government would provide money to each child’s parents, who would then be free to spend it “at a school of their own choice.”⁵⁰⁴ Nonprofits, private businesses, and even “governmental units” would run schools.⁵⁰⁵ Meanwhile, students and parents would hold the power of selection.⁵⁰⁶ The primary difference between the United States of 2012 and Friedman’s 1955 vision of the future lies in the mechanism by which the

⁴⁹⁸ Natalie Lacireno-Paquet, *Do EMO-Operated Charter Schools Serve Disadvantaged Students? The Influence of State Policies*, 12 EDUC. POLICY ANALYSIS ARCHIVES 26, 3 (2004), available at <http://epaa.asu.edu/epaa/v12n26/>.

⁴⁹⁹ Milton Friedman, *The Role of Government in Education*, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE 1, 1(1955), <http://www.edchoice.org/The-Friedmans/The-Friedmans-on-School-Choice/The-Role-of-Government-in-Education-%281995%29.aspx>.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 2.

⁵⁰² *Id.* at 3.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 6.

⁵⁰⁵ *Id.* at 3.

⁵⁰⁶ *Id.*

government distributes funds. Rather than providing money directly to each child's parents, today, funds flow from the federal government to *schools* on a per-student basis.⁵⁰⁷ In terms of the entities controlling the schools themselves, however, Friedman was basically correct. We now live in a world in which "private initiative and enterprise [has quickened] the pace of progress" and government in some instances serves "its proper function of improving the operation of the invisible hand without substituting the dead hand of bureaucracy."⁵⁰⁸

Friedman's 1955 paper did not have an immediate effect on the public education landscape. In fact, the country would soon move in the opposite direction. Ten years later, President Lyndon Johnson, leaning on the legacy of his predecessor, John Kennedy, pushed a bill through Congress that instilled almost the opposite system Friedman desired.⁵⁰⁹ In 1965, Congress ratified the Elementary and Secondary Education Act ("ESEA"), with "little debate and no amendments."⁵¹⁰ The ESEA was by far the most expansive foray of the federal government into public education in United States history, a realm that to that point had been left largely to the states.⁵¹¹ As part of Johnson's initiatives like the Great Society and the War on Poverty, the ESEA sent huge block grants under its Title I to schools with high numbers of poor and disadvantaged students.⁵¹² The basic premises of the original ESEA flew in the face of Friedman's warnings about an expansive presence for the federal government in funding schools and set the status quo that persists today.

The ESEA was reauthorized in 2001 as NCLB,⁵¹³ even while questions lingered over whether federal money had been properly spent over the previous thirty-six years.⁵¹⁴ Many advocates claimed that even with the large amount of dollars leaving federal coffers, achievement gaps had not narrowed.⁵¹⁵ NCLB installed an intense testing regime that punished schools for failure, but did not back up these new requirements with adequate

⁵⁰⁷ Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

⁵⁰⁸ Friedman, *supra* note 39, at 6.

⁵⁰⁹ Compare *id.*, with Elementary and Secondary Education Act.

⁵¹⁰ Tomiko Brown-Nagin, *Elementary and Secondary Education Act of 1965*, in 2 MAJOR ACTS OF CONGRESS 232, 233 (Brian K. Landsberg ed., 2004).

⁵¹¹ *Id.* at 232.

⁵¹² See *id.*; Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

⁵¹³ See Forum On Educational Accountability, *About NCLB/ESEA*, http://www.edaccountability.org/-About_NCLB.html (last accessed Mar. 31, 2013); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6301 (2006)).

⁵¹⁴ See generally Koret Task Force on K-12 Educ., *Choice and Federalism: Defining the Federal Role in Education*, i (2012), <http://media.hoover.org/documents/Choice-and-Federalism.pdf>.

⁵¹⁵ *Id.* at i.

federal dollars.⁵¹⁶ By 2007, six years after passage of the law, NCLB was \$55 billion behind the level of funding Congress had authorized.⁵¹⁷ Calls in the last five years for reauthorization of the ESEA and a fundamental overhaul of the discredited NCLB have been largely ignored, and the only significant change in federal education funding policy has been the Obama Administration's choice to shift control from the legislative process to the executive through waivers to NCLB and the creation of the Race to the Top program.⁵¹⁸ The funding mandates of the ESEA/NCLB remain the standard, and schools continue to rely heavily on the generosity of these programs, however limited they have become.⁵¹⁹ Today, national education policy is characterized by a Congress unwilling to revamp its philosophical commitment to NCLB—an unrealistic system of accountability premised on the notion that all students in the United States will read at grade level by 2014—nor to exercise its political will to re-envision the federal education system.⁵²⁰

While federal education policy has been marked by indecisiveness and a lack of leadership, corporate education entities have been working to build coalitions and establish themselves in the national public education landscape for the last twenty years.⁵²¹ If success is measured by market share, few business sectors have been more successful at establishing a competitive basis to acquire federal funds. As the percentage of students in traditional public schools has declined, it has risen almost as fast in schools run by corporations.⁵²² To understand how this has happened, it is necessary to examine the rise of charter schools in general.

III. THE HISTORY OF CHARTER SCHOOLS: LATENT PRIVATIZATION

Charter schools are open to all students free of charge.⁵²³ They are non-sectarian and are not permitted to discriminate against students on any

⁵¹⁶ Forum On Educational Accountability, *supra* note 53.

⁵¹⁷ *Id.*

⁵¹⁸ United States Dep't of Educ., *supra* note 10, at 2.

⁵¹⁹ See generally Miron & Urschel, *supra* note 11.

⁵²⁰ See Joy Resmovits, *No Child Left Behind Reauthorization Debate Likely to Continue in Obama Second Term*, HUFF. POST (Nov. 11, 2012, 8:04 PM), http://www.huffingtonpost.com/2012/11/19/no-child-left-behind-reauthorization_n_2161498.html.

⁵²¹ See *id.* See generally James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of A Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 840 (2007).

⁵²² See generally Forman, *supra* note 61.

⁵²³ Nat'l Alliance for Pub. Charter Sch., *What Are Charter Schools?*, <http://www.publiccharters.org/-About-Charter-Schools/What-are-Charter-Schools003F.aspx> (last accessed Dec. 11, 2012).

basis, including by gender, ethnicity, disability, class, or academic potential.⁵²⁴ They are funded publicly through local, state, and federal tax sources and they are held to the same overarching state and federal academic standards as any public school.⁵²⁵ Charter schools differ from traditional public schools in that they are often smaller and non-union and receive exemptions from certain state requirements about how to run themselves internally.⁵²⁶ Charter schools can decide how to spend their money: they pick who they hire, how to set up their administrations, what books to buy, and how much to rely on technology.⁵²⁷ They exist as part of a deal: they receive increased freedom from certain restrictions and regulations in exchange for a chance to experiment with new educational techniques and a promise to increase results.⁵²⁸ If they fail, local authorizers can revoke their charters.⁵²⁹ The idea is that students and parents can “shop” for charter schools in their area, and can choose to enroll in the schools they like best (or put their names in a lottery if there is more demand for a given school than there are spaces) in lieu of their local, traditional public schools.⁵³⁰

The charter school world has undergone extreme changes in ideology since its inception. What is today a movement fascinated with teacher quality, unsympathetic to unions, big on test results, and often at odds with traditional public schools was founded by a teacher and a union member expressly in opposition to those attributes.⁵³¹ It was not clear twenty years ago that the visions of Milton Friedman would merge with those of the founders of the charter school movement, and, abetted by burgeoning innovations in technology, coincide in the emergence of online for-profit schools. But in retrospect, the root ideologies of each fit together harmoniously.

The charter movement grew out of the separate but compatible ideas of two education pioneers: Ray Budde, a professor of educational management at the University of Massachusetts, and Albert Shanker, the former

⁵²⁴ Garda, *supra* note 30, at 662–63.

⁵²⁵ Nat’l Alliance for Pub. Charter Sch., *supra* note 63.

⁵²⁶ *Id.*

⁵²⁷ PAUL THOMAS HILL ET AL., CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 4 (2002).

⁵²⁸ Weber, *supra* note 31, at 218.

⁵²⁹ Garda, *supra* note 30, at 666–67.

⁵³⁰ Garda, *supra* note 30, at 656, 667, 669. The lottery system was famously dramatized in *Waiting for Superman*. See WAITING FOR SUPERMAN, *supra* note 8; see also Diane Ravitch, *The Myth of Charter Schools*, NEW YORK REV. OF BOOKS (Nov. 11, 2012) available at <http://www.nybooks.com/articles/archives/2010/nov/11/myth-charter-schools>.

⁵³¹ See, e.g., Albert Shanker, *supra* note 1.

President of the American Federation of Teachers. Budde's 1988 book, *Education by Charter: Restructuring School Districts*, gave the movement its name, linking the notion of a charter to the goals, objectives, and shared responsibilities of the Magna Carta and the voyage of Henry Hudson.⁵³² Budde's idea was that a group of teachers could propose a charter dedicated to a specific educational purpose, such a multi-level curriculum, a coordinated humanities program, or a whole-language approach.⁵³³ The school would be free from certain district requirements and would be given a multi-year chance to experiment with new ideas. Eventually, groups of charter schools would form a "crisscrossing system" that would "free the educational system from the bonds of 'single-year operation syndrome'."⁵³⁴ Each sector of the education world would benefit: charters would create "a strong sense of collegiality" among teachers, administrators would shed "the diffuse and heavy burden of being responsible for instruction," and principals could "continue doing what good principals are already doing: supporting their teachers and creating a safe, positive climate in which students can learn and grow."⁵³⁵ Accountability would come every five years in the form of a district review.⁵³⁶ If charters were not meeting the standards they set forth, the district could revoke the charter or demand a significant overhaul of the curriculum.⁵³⁷

Shanker's vision was similar. In a 1988 speech to the National Press Club, he outlined his ideas for a new kind of school that would promote authentic, teacher-driven innovation.⁵³⁸ Shanker's beliefs emerged from the aftermath of the 1980s education reform movement, which was sparked by the publication of *A Nation at Risk*, the 1983 report from Ronald Reagan's Commission on Educational Excellence.⁵³⁹ That report blasted the nation's "steady decline" in educational performance and called for vast improvements in content, expectations, time, and teaching.⁵⁴⁰ High school

⁵³² Ray Budde, *Education By Charter*, 70 PHI DELTA KAPPAN 7, 518–19 (1989).

⁵³³ *Id.* at 519.

⁵³⁴ *Id.* "Single-year operation syndrome" was the idea that schools spend so much time trying to stay afloat during the present school year that they rarely considering long-term holistic innovation. *Id.*

⁵³⁵ *Id.* at 520.

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ Eventually, after reading Budde's work, Shanker embraced the "charter" terminology. See Albert Shanker, *supra* note 1; Ted Kolderie, *Ray Budde and the Origins of the "Charter Concept"*, EDUCATION EVOLVING (Jun. 2005) available at <http://www.educationevolving.org/pdf/Ray-Budde-Origins-Of-Chartering.pdf>.

⁵³⁹ See generally The National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (Apr., 1983).

⁵⁴⁰ *Id.* at 11–12.

students' average achievement on standardized tests, the report lamented, was lower than it had been twenty-six years previously.⁵⁴¹ But more than that, "many 17-year-olds do not possess the 'higher order' intellectual skills we should expect of them. Nearly 40 percent cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps."⁵⁴² This was an issue, according to the Commission, because technology and computers were set to radically transform entire industries, including health care, construction, education, industrial science, and the military.⁵⁴³ "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today," the report concluded, "we might well have viewed it as an act of war."⁵⁴⁴ Shanker's design addressed this crisis in creativity by handing the reigns to *teachers* to rescue the curriculum from the educational ruts in which the nation found itself.⁵⁴⁵

Shanker's main complaint was that schools educated all students using a one-size-fits-all approach.⁵⁴⁶ Even after the shock of *A Nation at Risk*, Shanker found it upsetting that the country was "reforming" its schools through regulations about seat time, an increase in mandated classes, an overemphasis on homework, and a litany of "regurgitating" on standardized tests.⁵⁴⁷ These were remedies for the sake of remedies, designed by a government that was out of original ideas. Shanker directly invoked business language to explain why the government's reforms were obsolete.⁵⁴⁸ He wrote that in the business world, when an industry fails to regulate itself, it is not surprising to see the government step in and take control.⁵⁴⁹ That tendency is only natural, but equally understandable is the response from the business community, who, after a jolt, would want to control its own destiny.⁵⁵⁰

The whole point, Shanker said, was for the education community to re-take control of the reform movement, to come up "with better answers than would be imposed on them from some distance by those not actually

⁵⁴¹ *Id.* at 11.

⁵⁴² *Id.* at 12.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.* at 9.

⁵⁴⁵ Shanker, *supra* note 1, at 15.

⁵⁴⁶ *Id.* at 14.

⁵⁴⁷ *Id.* at 14-15.

⁵⁴⁸ *Id.* at 5.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* at 5.

involved in the field.”⁵⁵¹ Shanker envisioned the movement beginning through the formation of teacher-led autonomous “school[s] within . . . school[s].”⁵⁵² These new schools would institute higher expectations and standards, promote innovation in the school day, team-teach, and self-govern.⁵⁵³ Unsurprisingly given his position as the head of the major teachers’ union, Shanker also emphasized the importance of vigorous collective bargaining, asserting, “[y]ou don’t see creative things happening where teachers don’t have any voice or power or influence.”⁵⁵⁴

Proceeding from the visions of both Shanker and Budde, the system-within-a-system was born. Both men emphasized that these new schools would be schools of choice: no teacher would be forced into this arrangement and no parent would be obligated to send his children to them. In fact, Shanker found it essential that parents and teachers would collaborate with each other to build “a new structure.”⁵⁵⁵ Like Budde, Shanker wanted a guarantee that these new schools would be left to their own devices for five to ten years.⁵⁵⁶ Essentially, both men were calling on school policymakers to give free market innovation a chance to improve schools.

In 1991, the ideals of Budde and Shanker became reality when Minnesota became the first state to pass legislation authorizing the creation of charter schools.⁵⁵⁷ In 1992, the first charter school opened in St. Paul.⁵⁵⁸ The school, City Academy High School, largely honored Shanker’s dream. It served students as old as twenty-one and offered job skills training, counseling, and other social services.⁵⁵⁹ A local board, not a for-profit corporation, operated the school.⁵⁶⁰ The following year, California became the second state to authorize charters, and from there the movement skyrocketed.⁵⁶¹

⁵⁵¹ *Id.*

⁵⁵² *Id.* at 12.

⁵⁵³ *Id.* at 13.

⁵⁵⁴ *Id.* at 9.

⁵⁵⁵ *Id.* at 17.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Charter Schools*, MINNESOTA LEGISLATIVE REFERENCE LIBRARY (July 2012), www.leg.state.mn.us/lrl/issues/issues.aspx?issue=charter; see also Minn. Stat. § 124D.10 (2012).

⁵⁵⁸ *Charter Schools*, *supra* note 97.

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Understanding the Landscape*, CAL. CHARTER SCH. ASS’N, <http://www.calcharters.org/-starting/landscape> (last visited Mar. 31, 2013); *Charter School History and Policy*, EDSOURCE,

From the very beginning of charter schools, all sides of the political spectrum found something to embrace. Charter schools represented both a Friedmanite method for transferring control of schools from the government to private citizens and a way in which liberal educators could institute local curriculum centered on marginalized communities. In 1993, the conservative Heritage Foundation sponsored the Center for Education Reform to back decentralized control of schools.⁵⁶² The liberal Brookings Institution created its own policy arm shortly thereafter.⁵⁶³ The centrist Democratic Leadership Council also endorsed the movement, and in 1994, Bill Clinton pushed legislation through Congress that set aside federal money to spur the development of charter schools.⁵⁶⁴ Voucher advocates of the Reagan era and liberal ethnic studies proponents both found elements they could stand behind. As Diane Ravitch wrote, it is ironic that George W. Bush, a conservative Republican, presided over the “largest expansion of federal control in the history of American education. It was likewise ironic that Democrats embraced market reforms . . . that traditionally had been favored by Republicans.”⁵⁶⁵ All in all, with few political opponents, support for charter schools has grown exponentially over the last twenty years. Today, forty-one states and the District of Columbia permit charter schools, and there are over 5,000 charters in existence.⁵⁶⁶

IV. THE EMERGENCE OF FOR-PROFIT EDUCATION COMPANIES

Due to both deliberate and unintentional policy decisions, Milton Friedman’s vision of an educational system funded by government but run by private companies has remained foundational to the charter school movement. From their creation, discussion about charter schools and school choice were grounded in microeconomic theory. As two education scholars wrote in 1990 in justification of privatized education, “the private market can determine the appropriate quantity and quality of a good by reaching an equilibrium between consumers and producers that optimizes the utility of

http://www.edsource.org/iss_charter_policy.html (last visited Mar. 31 2013).

⁵⁶² Dorothy Shipps, *The Politics of Educational Reform*, in SHAPING EDUCATION POLICY: POWER AND PROCESS 259, 278 (Douglas E. Mitchell et al. eds., 2011).

⁵⁶³ See *K-12 Education*, BROOKINGS INSTITUTION, <http://www.brookings.edu/research/topics/k-12-education> (last visited Mar. 31, 2013).

⁵⁶⁴ DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* 125 (2010).

⁵⁶⁵ *Id.* at 21.

⁵⁶⁶ Elaine Mulligan, *The Facts on Charter Schools and Students with Disabilities*, NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES, <http://www.nichcy.org/wp-content/uploads/docs/charterschools.pdf>.

consumers and the profit of producers . . . the bureaucracy of governments leads to ineffective and inefficient institutions.”⁵⁶⁷

While the charter founders themselves never envisioned a role for private companies in *running* charter schools, charters fit naturally into public-private partnerships.⁵⁶⁸ As Ray Budde originally envisaged, the core of a charter school is the charter itself, and innate in that founding document is a market conception. After all, a charter is essentially a performance contract.⁵⁶⁹ There are two sides to the agreement and a quid pro quo: authorizers agree to a set of stipulations and charter schools agree to produce results. If the relationship falters in the middle, the authorizer may cancel the deal, but if the school performs well, the authorizer can extend the contract.⁵⁷⁰ The nature of the agreement also lends itself easily to a public-private affiliation, as it is premised on the notion that whoever manages the charter school—whether it be a public or a private entity—it is *not* the school district.

Like Budde, Albert Shanker’s original plan for charter schools also included private business, even while, echoing Freidman, he anticipated the need for public financing. Charter schools “will have to operate on the same money that all other schools do,” he said, and added “[t]here is a role in all this for the federal government, state government, the local government, the business community, and foundations.”⁵⁷¹ Shanker could not have anticipated the extent to which he would be correct.

Wall Street analysts coined the term “educational management organization” (“EMO”) in the 1990s as an analogue to health management organizations (“HMOs”) in the health sector.⁵⁷² The term EMO refers most often to a for-profit business that draws upon a range of funding inputs, including venture capital and public funds, and that seeks to return profits to investors.⁵⁷³ EMOs manage schools, but they do not technically run

⁵⁶⁷ Lacireno-Paquet, *supra* note 38, at 3.

⁵⁶⁸ *Id.*

⁵⁶⁹ See HILLET AL., *supra* note 67, at 4.

⁵⁷⁰ See *id.*; see also Guilbert C. Hentschke et al., *Education Management Organizations: Growing a For-Profit Education Industry with Choice, Competition and Innovation*, REASON PUB. POL’Y INST. 1, 7 (May 1, 2002), <http://reason.org/files/86f373eefe12bf11ff614e1305ff3362.pdf>.

⁵⁷¹ Shanker, *supra* note 1, at 18.

⁵⁷² Miron et al., *supra* note 12, at 1.

⁵⁷³ *Id.* at 2; see Hentschke et al., *supra* note 110, at 4 (discussing the role of venture capital and public funds in for-profit EMOs). There are also non-profit EMOs, but they are outside the scope of the examination here.

them.⁵⁷⁴ They are distinct from authorizers, school districts, and even charter founders.⁵⁷⁵ They provide curriculum, management, and resources.⁵⁷⁶ They are not, however, service contractors, who are often referred to as “vendors.”⁵⁷⁷ A vendor provides more targeted and specific services, such as accounting, transportation, benefits and payroll, professional development, and even special education in some places.⁵⁷⁸ EMOs, by contrast, supply the core academic and curricular needs of schools.⁵⁷⁹ While privatization advocates often point out that since long before the advent of charter schools, traditional public schools found it useful to contract with private companies for a range of services—including textbooks, food services, and transportation contracts—the move to full administration of public schools by private companies marked a fundamental shift in education policy in the United States.⁵⁸⁰ The central difference is the degree to which a company running a school has the power to violate students’ fundamental rights as enshrined in law.⁵⁸¹ In other words, there is a big difference between a company having a say in the construction of a textbook and a company controlling the entire substance of a school.

The first EMO began in the same time and place as charters more generally—1990s Minnesota.⁵⁸² Growth of EMOs in the 1990s and 2000s was explosive. The number of for-profit EMOs nationwide grew from 5 in the 1995-1996 school year to 99 in 2010-2011, and the number of schools those EMOs operated increased from 6 to 758 over the same time span.⁵⁸³ During those years, enrollment increased from around 1000 students in 1995-1996 to about 394,000 in 2010-2011.⁵⁸⁴ For-profit companies now operate in thirty-three states.⁵⁸⁵ About 35% of all public charter schools in

⁵⁷⁴ *Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003 (9th Cir. 2006). The court makes this distinction clear. While private companies are not eligible for federal special education money, charter schools are free to contract out the management of their schools at 100%, making this distinction one of paperwork. *Id.* at 1009–10.

⁵⁷⁵ *See, e.g., Miron et al., supra* note 12, at 3.

⁵⁷⁶ *See generally, Hentschke, supra* note 110.

⁵⁷⁷ *Miron et al., supra* note 12, at 2.

⁵⁷⁸ *Id.*

⁵⁷⁹ *See Hentschke, supra* note 110, at 6.

⁵⁸⁰ *Forman, supra* note 61, at 850.

⁵⁸¹ *Zollers & Ramanathan, supra* note 29, at 303.

⁵⁸² *See The History of For-Profit Education Management Organizations*, at 3, http://a100educational-policy.pbworks.com/f/EMO_History.pdf (last accessed Mar. 31, 2013). Its original name was Educational Alternatives, but in a symbol of the future of many EMOs, the company soon foundered on educational instability and merged with another EMO out of Arizona.

⁵⁸³ *See Miron et al., supra* note 12, at ii.

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.* at iii.

the U.S. are operated by private companies, accounting for about 42% of all students enrolled in charter schools nationwide.⁵⁸⁶ Almost all of the schools managed by EMOs nationwide (94%) are charter schools.⁵⁸⁷

There are many advertised benefits to the administration of schools by private companies. Corporations are theoretically better at monitoring student progress, mastering the substantial reporting and business aspects of running a school, and managing finances.⁵⁸⁸ They also have a financial incentive to increase enrollment and to perform well because their contracts can be terminated, whereas traditional public schools often receive funding regardless of performance.⁵⁸⁹ A national company like K12, Inc., which operates hundreds of schools across the United States, can also take advantage of economies of scale; it can develop one set of curricula, pedagogical principles, and administration policies, and apply those innovations to its entire cadre of schools. In theory, privately run public schools face more accountability, because, under the central tenet of school choice, students can leave if they are dissatisfied.⁵⁹⁰ EMOs can also help with startup funds and curriculum development, which theoretically frees founders to concentrate on their local mission.⁵⁹¹

Critics of allowing strong private involvement in public education cite the fiduciary duty publicly traded companies owe to their shareholders.⁵⁹² This mission often conflicts with the concurrent duty to students and federal standards, given the companies' acceptance of federal funds.⁵⁹³ Detractors also cite a lack of control and decision-making for charter boards that have contracted with private companies.⁵⁹⁴ Once a school hands over curricular control to a private company and invests time and energy into that company, it may be difficult to cancel a contract for lack of performance.⁵⁹⁵ The authority that a private company may exercise over a charter school also violates one of the central ideas of the choice movement:

⁵⁸⁶ *Id.* at *i*. (figures are the most recent available, from the 2010-2011 school year).

⁵⁸⁷ *Id.* at *iii*.

⁵⁸⁸ Anne E. Trotter, Suzanne E. Eckes & Jonathan A. Plucker, *Education Management Organizations and Charter Schools: Serving All Students*, 213 ED. LAW. REP. 935, 938 (2006).

⁵⁸⁹ *Id.* at 936, 940.

⁵⁹⁰ *See id.*; *see also* Sandra Vergari, *Charter Schools: A Significant Precedent in Public Education*, 59 N.Y.U. ANN. SURV. AM. L. 495, 508 (2003).

⁵⁹¹ *See* Trotter et al., *supra* note 128, at 940.

⁵⁹² *Id.*

⁵⁹³ *Id.* at 941.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*; Vergari, *supra* note 130, at 508.

independence.⁵⁹⁶ Moreover, economies of scale also have drawbacks: they can lock a standardized curriculum in a place where a customized, local focus would better serve students. Finally, privatized charter schools lack transparency and tend to favor efficiency and their bottom line over their duty to serve all students.⁵⁹⁷

But the crux of the debate over the effectiveness of privatized education revolves around funding mechanisms. Charter schools funded by districts in general receive less money per pupil than traditional public schools.⁵⁹⁸ In amending ESEA in 1997, Congress found that only one state—the original charter platform, Minnesota—provided charter schools with both capital and operating per-pupil expenses.⁵⁹⁹ The remainder of states granted only operating funds to charters, leaving them to fend for funds for buildings and facilities on their own.⁶⁰⁰ Today, many states fund only 70% to 90% of schools' necessary operating expenses.⁶⁰¹ Additionally, charter school boards lack authority to issue school construction bonds that can be used to finance capital improvements and the building of new schools.⁶⁰² Traditional public schools, by contrast, receive money for both capital and operating expenses, and frequently take advantage of bond initiatives to maintain financial viability.⁶⁰³ While conventional public schools receive free access to buildings, most charters must rent space using money that could otherwise go towards instruction.⁶⁰⁴ This kind of hard choice is one primary reason that charter schools often seek donations and private support or hand their entire operation over a private company.⁶⁰⁵ Charters authorized by school districts must combat the vested interest of those districts in funding the traditional public schools over the charter schools,⁶⁰⁶

⁵⁹⁶ Trotter et al., *supra* note 128, at 941.

⁵⁹⁷ *Id.*

⁵⁹⁸ Jeanette M. Curtis, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal Access to Public School Funds*, 55 HOW. L.J. 1057, 1060–61 (2012).

⁵⁹⁹ H.R. REP. NO. 105-321, at 17 (1997).

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

⁶⁰² *Id.*

⁶⁰³ *Id.*

⁶⁰⁴ HILL ET AL., *supra* note 67, at 5.

⁶⁰⁵ *Id.*

⁶⁰⁶ MEAGAN BATDORFF ET AL., BALL STATE UNIVERSITY, CHARTER SCHOOL FUNDING: INEQUITY PERSISTS 14 (2010), available at <http://cms.bsu.edu/media/WWW/DepartmentalContent/Teachers/PDFs/charterschfunding051710.pdf>; see also *Measuring Up to the Model: A Tool for Comparing State Charter School Laws*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, <http://www.publiccharters.org/law/ViewState.aspx?state=NM>.

many districts charge a flat fee simply for having charter schools under their purview.⁶⁰⁷

According to a 2010 report from Ball State University entitled *Charter School Funding: Inequity Persists*, charter schools remain underfunded, in some cases severely so, when compared with traditional public schools.⁶⁰⁸ The report warns that under-funding threatens the welfare of children attending charter schools, and especially students in urban areas.⁶⁰⁹ These students, who “derive the greatest benefit from new and innovative ways of thinking about learning, experienced the greatest disparity in funding. Thus, true school choice may be denied de facto, or at least severely impaired, for those students who already have few positive educational opportunities.”⁶¹⁰ Founding and running a charter school has become increasingly difficult in the face of these myriad financial impediments.

Difficulties in obtaining full public funding have led to a slowdown in growth in for-profit EMOs over the past few years.⁶¹¹ Many EMOs, failing to adequately predict the costs involved with educating many types of children and navigating the complex fiscal landscape, have simply folded.⁶¹² Some EMOs are now looking to diversify into collateral fields like educational publishing, but two companies expanded into the school management arena this year.⁶¹³ EMO mergers appear to be increasing.⁶¹⁴ Concerns about the motives of private companies are also complicating their efforts to expand. In Washington state, a legislator expressed concern that the legislature there was handing millions of dollars in state funds to private companies without being able to exert much control over the schools it was funding.⁶¹⁵

Struggling EMOs looking to increase profits in the face of a complicated financial climate are increasingly turning to cyber charters as an alternate method of augmenting their portfolios. Cyber charters account for over ten

⁶⁰⁷ See Knight, *supra* note 22, at 410.

⁶⁰⁸ W. Holmes Finch, *Introduction* to Batdorff et al., *supra* note 146, at i.

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.* at i–ii.

⁶¹¹ Miron et al., *supra* note 12, at i.

⁶¹² *The History of For-Profit Education Management Organizations*, *supra* note 122, at 4.

⁶¹³ These are Pearson Education and Cambridge Education, LLC. See Miron et al., *supra* note 12, at ii.

⁶¹⁴ *The History of For-Profit Education Management Organizations*, *supra* note 122, at 3.

⁶¹⁵ Lin, *supra* note 13, at 184. A public school official put it this way: “They’re experimenting with kids’ lives on the public dollar.” Kevin P. Brady, Regina R. Umpstead & Suzanne E. Eckes, *Unchartered Territory: The Current Legal Landscape of Public Cyber Charter Schools*, 2010 B.Y.U. EDUC. & L.J. 191, 203 (2010).

percent of EMO-run schools, but because they enroll many more students on average than brick-and-mortar schools, they total more than 27% of all students in EMO-run schools.⁶¹⁶ Both of those proportions continue to rise.⁶¹⁷ In contrast to the rest of the private education sector, where there is much more diversity in company size, nearly all of the virtual schools are run by five large EMOs.⁶¹⁸

The kind of virtual school these EMOs favor is fully online, not a hybrid of classroom- and internet-based instruction (nearly all schools today are hybrid in some way, in that they require students to complete some percentage of their work online).⁶¹⁹ These schools may or may not have actual brick-and-mortar buildings.⁶²⁰ A student attending a fully virtual school may live hundreds of miles from the school's location and thus receive no instruction at the school site.⁶²¹ Lessons at these schools are dubbed "asynchronous," meaning that students and teachers work at different times, through tools like threaded discussion boards, testing programs, and help systems.⁶²² Coursework at virtual schools is primarily conducted on computers, through video lectures, PowerPoints, and virtual lessons—but students may also have paper textbooks or be required to perform science experiments in their homes using available materials.⁶²³ Students enrolled in virtual schools obtain help and support with their work through online communication with the school's teachers, and from their parents or other people in their home.⁶²⁴

V. THE EXCLUSION OF THE EXPENSIVE

Questions about for-profit charter schools and students with disabilities surfaced almost from the date EMOs came into existence. A landmark 1998 article by Nancy Zollers and Arun Ramanathan, subtitled *The Sordid Side*

⁶¹⁶ Miron et al., *supra* note 12, at 10.

⁶¹⁷ *Id.* at 9–10.

⁶¹⁸ These five EMOs are: Connections Education, K12, Inc., Leona Group, Mosaica Education, and White Hat Management. Connections, recently acquired by the education giant Pearson, and K12 are the two "dominant players." *Id.* at 10.

⁶¹⁹ Greg Vanourek et al., *An (Updated) Primer on Virtual Charter Schools: Mapping the Electronic Frontier*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS 1, 5 (Sept. 2011) [hereinafter NACSA], http://www.qualitycharters.org/images/stories/publications/Issue_Briefs/NACSA_Cyber_Series_EvergreenIssueBrief.pdf.

⁶²⁰ The laws of some states, such as New Mexico, require all schools to have an actual building. N.M. STAT. ANN. § 2-8B-4.2 (2011).

⁶²¹ NACSA, *supra* note 159, at 2.

⁶²² *Id.* at 15.

⁶²³ *Id.* at 8.

⁶²⁴ *Id.* at 13.

of the Business of Schooling, chronicled major legal improprieties at Massachusetts EMOs.⁶²⁵ While these schools did a “decent” job of including students with *mild* disabilities, they “engaged in a pattern of disregard and often blatant hostility toward students with more complicated behavioral and cognitive disabilities.”⁶²⁶ These companies not only enrolled a far lower number of students with severe disabilities than did traditional public schools, but treated students with severe disabilities as “financial liabilities.”⁶²⁷ The offending schools were enabled, according to Zollers and Ramanathan, by “a state government that coddles charter schools while singling them out as examples of free-market accountability and innovation.”⁶²⁸

Zollers and Ramanathan interviewed dozens of parents and discovered a variety of ways that Massachusetts EMOs pushed away students with severe disabilities.⁶²⁹ One of the most common practices was “counseling out” students.⁶³⁰ Because EMOs often engage in recruiting campaigns to ensure they fill their schools, their representatives have more contact with the general public than do administrators of traditional public schools.⁶³¹ As EMOs engaged in self-promotion, they were simultaneously telling parents of expensive students that they would be “better served” in traditional public schools.⁶³² For students who enrolled nonetheless, the schools were often using inappropriate disciplinary procedures: segregating students in violation of the least restrictive environment requirement, suspending students improperly, and eventually trying to counsel them out.⁶³³ These practices are broadly illegal, but parents who were unaware of their full rights under special education law were especially susceptible to this soft discrimination.⁶³⁴ While there was nothing harmless about the actual practices the schools used, on paper nothing untoward appeared. A parental signature on the transfer application indicated that the transfer was a “voluntary” parental decision.⁶³⁵ In the case of families of students with

⁶²⁵ Zollers & Ramanathan, *supra* note 29, at 298.

⁶²⁶ *Id.*

⁶²⁷ *Id.* at 297.

⁶²⁸ *Id.* at 298.

⁶²⁹ *Id.* at 299.

⁶³⁰ *Id.* at 299.

⁶³¹ *Id.*

⁶³² *Id.*

⁶³³ *Id.* at 300.

⁶³⁴ Mary Bailey Estes, *Charter Schools and Students With Disabilities: How Far Have We Come?*, 30 REMEDIAL & SPECIAL EDUC. 216, 217 (2009).

⁶³⁵ Zollers and Ramanathan, *supra* note 29, at 300.

severe disabilities who were counseled not to attend charters from the outset, there would be no paper trail at all.

Compounding these practices was the manner in which Massachusetts funded special education. Each charter school there received per-student funding based on its local district's special education and bilingual expenses, excluding the cost of private special placements.⁶³⁶ Because the EMOs enrolled fewer students with severe disabilities and because they often claimed special funds for "substantially separate" classes of students with only moderate disabilities, they received a major advantage in funding over traditional public schools.⁶³⁷ On top of that, Massachusetts also forced local districts—not charters—to pay for the busing of students to charter schools.⁶³⁸ The state allowed for-profit companies to create "for-profit nonprofit[s]" that could apply for federal special education money—the cost of which was, again, based on the costs of educating students in the local district.⁶³⁹ To add to the inequity, when students with severe disabilities left charter schools, regardless of whether they did so voluntarily, they most often returned to traditional public schools, thereby further raising the districts' costs.⁶⁴⁰ These practices meant that for-profit companies were taking advantage of financial incentives but not upholding their end of the financial bargain to students.⁶⁴¹ The companies treated education as another market to be maximized.⁶⁴²

In the fifteen years since Zollers and Ramanathan conducted their research, these problematic behaviors have not abated. A recent report from the Government Accountability Office ("GAO"), the investigative arm of Congress, found that nationwide, charter schools enroll a lower percentage of students in thirteen disability categories compared to traditional public schools.⁶⁴³ The audit noted that "[a]necdotal accounts also suggest that some charter schools may be discouraging students with disabilities from enrolling and denying admission to students with more severe disabilities

⁶³⁶ *Id.* at 301. Zollers and Ramanathan also discuss how these for-profit schools enroll a lower percentage of bilingual students. *Id.*

⁶³⁷ *Id.*

⁶³⁸ *Id.*

⁶³⁹ *Id.* But see *Arizona State Bd.*, 464 F.3d 1003, 1010 (9th Cir. 2006) (holding that for-profit charter schools were ineligible for federal funding under the IDEA and ESEA).

⁶⁴⁰ Zollers and Ramanathan, *supra* note 29, at 301.

⁶⁴¹ *Id.*

⁶⁴² *Id.*

⁶⁴³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 9 (2012) [hereinafter GAO].

because services are too costly.”⁶⁴⁴ In other words, charter schools are still engaged in widespread behavior that violates federal law.

The GAO report found that charter schools nationwide contain approximately 8.2% special education students, as compared to 11.2% for traditional public schools.⁶⁴⁵ While the GAO reported that “little is known about the factors contributing to differences in enrollment patterns,” the report discusses a number of practices Zollers and Ramanathan identified more than a decade before.⁶⁴⁶ The GAO found evidence of counseling out and of schools denying admission to students with severe disabilities.⁶⁴⁷ It also uncovered the practice of giving “placement exams,” which may discourage students from attending because they target general education students and do not offer appropriate accommodations to students with disabilities.⁶⁴⁸ In response to this procedure, the GAO found that many states are beginning to require that charter schools remove any questions about disability from their application forms, as these questions are a potential source of discouraging parents or promoting discrimination on the part of the school.⁶⁴⁹ The GAO report exposed that some charter schools to approach special education “informally,” implementing modifications without including them on students’ official special education plans.⁶⁵⁰ Charter school representatives and researchers noted that schools also engaged in reassessments of special education students that determined the students no longer required special education services.⁶⁵¹

In response to these critiques, charter proponents argue that their schools have lower numbers of special education students because their small size and low student-to-teacher ratios allow them to better serve *all* students.⁶⁵² They argue that special education students who come to charter schools may discover, through intensive instruction, that improved differentiation across the entire classroom helps them realize that they no longer require

⁶⁴⁴ *Id.* at 12.

⁶⁴⁵ *Id.* at 6–7.

⁶⁴⁶ *Id.* at 11. Compare Zollers & Ramanathan, *supra* note 29, at 299–301, with GAO, *supra* note 183, at 12–13.

⁶⁴⁷ GAO, *supra* note 183, at 12–13; see Zollers & Ramanathan, *supra* note 29, at 299.

⁶⁴⁸ GAO, *supra* note 183, at 13.

⁶⁴⁹ *Id.* at 15.

⁶⁵⁰ *Id.* at 12–13. This practice creates huge problems when a student moves schools, and it violates the central protectionary promise of special education law.

⁶⁵¹ *Id.* at 14. This process may work with misdiagnosed students with ADHD, for example, but it has no relevance to students with severe impairments whose special education status is hardly in controversy.

⁶⁵² See Estes, *supra* note 174, at 217.

special education services at all.⁶⁵³ Students who, in traditional public schools, might be misdiagnosed with learning disabilities, can thrive in charter schools after this intensive instruction.⁶⁵⁴ And, as Angela Ciolfi and James Ryan argue, parents in struggling traditional schools often seek the procedural protections of special education as a way of safeguarding their childrens' civil rights, even if their children have no disabilities.⁶⁵⁵ Once these students enter charters that already have those rights foremost in mind, charter proponents argue, the need for special education falls away.⁶⁵⁶ Charter school officials also claim that, according to one scholar, "their enrollment numbers are lower partly because many parents of special-needs children choose to enroll in traditional schools that often are more experienced providing such services, or in private schools that can give those students individualized attention."⁶⁵⁷ Yet even these positive aspects of charter schools point to the limited availability of school choice. While true parental choice is the primary ideal of the current reform movement, the de facto practices of many charter schools expose the lack of symmetry between charter and traditional schools vis-à-vis students with disabilities. The policies of exclusion of many charters make it clear that parents often feel as if they have no choice at all.⁶⁵⁸

Several recent lawsuits and administrative complaints have exposed additional illegal practices at charter schools. In a 2011 complaint filed with the Justice Department, the Bazelon Center, a nonprofit advocacy group, alleged that Washington D.C. charter schools systematically discriminate against students with disabilities.⁶⁵⁹ About 18% of students in traditional public schools in Washington, D.C., receive special education services, compared with 11% in charter schools.⁶⁶⁰ The Washington, D.C., schools system contains an unusually high percentage of charter schools, which serve about 29,000 students.⁶⁶¹ The District's identity as a vanguard in the

⁶⁵³ Stephanie Banchemo & Caroline Porter, *Charter Schools Fall Short on Disabled*, WALL ST. J., June 19, 2012, available at <http://online.wsj.com/article/SB100014240527023033792045774770038-93836734.html#>.

⁶⁵⁴ *Id.*

⁶⁵⁵ Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 339–40 (2011).

⁶⁵⁶ Banchemo & Porter, *supra* note 193.

⁶⁵⁷ *Id.*

⁶⁵⁸ GAO, *supra* note 183, at 12.

⁶⁵⁹ Bill Turque, *Advocates Accuse D.C. Charter Schools of Excluding the Disabled*, WASH. POST, May 13, 2011, available at http://articles.washingtonpost.com/2011-05-13/local/35263131_1_charter-schools-charter-sector-public-education-options.

⁶⁶⁰ *Id.*

⁶⁶¹ *Id.*

charter movement brings high stakes to these charges for both charter advocates and critics.⁶⁶² The complaint alleges similar kinds of discrimination as Zollers and Ramanathan and the GAO found: counseling out, disability questions on applications, and claims of lack of capacity.⁶⁶³

One family's case was illustrative. A student named Jared McNeil was recently expelled from a charter school for misbehavior, his mother said in an interview with the *Washington Post*.⁶⁶⁴ He did not enter the school with special education status, but was later diagnosed with "oppositional defiant disorder," which required him to "spend five hours a week outside the classroom receiving special services."⁶⁶⁵ His mother said school counselors told her that "you might want to start looking for other schools," in violation of special education law.⁶⁶⁶ School officials claimed that the expulsion was not related to his disability, but his mother maintains that he was forced out expressly because he was disabled.⁶⁶⁷ Special education law requires schools to carry out certain procedural protections before a student can be expelled if the behavior in question results from the student's disability.⁶⁶⁸ As McNeil's mother asserted, the school cannot simply expel a student with a disability without due process.⁶⁶⁹

In the 2010, the Southern Poverty Law Center filed an administrative complaint with the Louisiana Department of Education ("LDE") on behalf of students with disabilities in New Orleans.⁶⁷⁰ The complaint alleged widespread discrimination against students in the Recovery School District ("RSD"), a post-Katrina special school district that took over low-performing schools previously run by the Orleans Parish School Board.⁶⁷¹ Over 70% of students in New Orleans attend charter schools, the highest

⁶⁶² See WAITING FOR SUPERMAN, *supra* note 8 (highlighting the controversy surrounding former Washington, D.C., Superintendent Michelle Rhee).

⁶⁶³ Turque, *supra* note 199.

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.*; see 20 U.S.C. § 1412(a)(1)(A) (2004); 34 C.F.R. § 300.101 (2006).

⁶⁶⁷ Turque, *supra* note 199.

⁶⁶⁸ See 20 U.S.C. § 1415(k)(1)(E)–(F) (2004) (provisions regarding manifestation determinations).

⁶⁶⁹ See 20 U.S.C. § 1415(k) (procedures for removal of a special education student to an alternative placement). The school refutes the charge, calling it "absolutely false." Turque, *supra* note 199.

⁶⁷⁰ Complaint at 1, *Berry v. Pastorek*, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010), available at <http://www.lawyerscommittee.org/admin/education/documents/files/FILED-COMPLAINT-P-B-v-Pastorek.pdf>.

⁶⁷¹ EDUC. PROJECT, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, *Louisiana Department of Education Litigation*, <http://www.lawyerscommittee.org/projects/education/page?id=0017> (last visited Mar. 5, 2013). See *Berry*, *supra* note 210.

rate in the nation.⁶⁷² When the LDE and the plaintiffs could not come to an agreement, the Lawyers' Committee for Civil Rights Under Law filed a class action lawsuit on behalf of an estimated 4,500 students with disabilities in New Orleans.⁶⁷³ The complaint alleges many of the same practices identified in other locales: under-representation of special education students in charter schools (12.6% vs. 7.8%), counseling out, and state refusal to fix the problems.⁶⁷⁴ At one school, an administrator allegedly told a plaintiff that he was "no longer welcome" at the school due to his disability.⁶⁷⁵ The student could not find a school that would accept him and he remained out of school "for over 15 days without education services or a behavior support plan."⁶⁷⁶ Another plaintiff reported being rejected by five different New Orleans schools due to his disability.⁶⁷⁷ School officials also told students that their schools could not accommodate severe disabilities.⁶⁷⁸ In an affront to the federal disability law, one school even lacked wheelchair accessibility.⁶⁷⁹ All of these practices violate federal law.⁶⁸⁰

The issues in New Orleans did not occur sporadically or in isolation, according to the complaint, but represented a pattern of systematic discrimination.⁶⁸¹ Schools failed to identify students who required special education.⁶⁸² When the schools identified students who required additional services, officials made cynical efforts to confine the necessary remedies to sections of the law that require less procedural protection rather than recommend full special education.⁶⁸³ Critical diagnostic tests were excessively delayed,⁶⁸⁴ students routinely fell behind despite requesting services, and the graduation rate among students with disabilities in the RSD fell to 6.8%, compared to 19.4% statewide.⁶⁸⁵ Almost half the students

⁶⁷² *Id.*

⁶⁷³ *Berry, supra* note 210, at 4.

⁶⁷⁴ *Id.* at 3–4.

⁶⁷⁵ *See id.* at 33–34.

⁶⁷⁶ *See id.* at 34.

⁶⁷⁷ *See id.* at 19.

⁶⁷⁸ *See id.* at 19.

⁶⁷⁹ *See Berry, supra* note 210, at 19.

⁶⁸⁰ *See, e.g.,* 42 U.S.C. § 12132 (1990) ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). *See generally* 20 U.S.C. § 1412 (2005); 34 C.F.R. § 300 (2006).

⁶⁸¹ *Berry, supra* note 210, at 10.

⁶⁸² *Id.* at 19–20, 22.

⁶⁸³ *Id.* at 20.

⁶⁸⁴ *Id.* at 23.

⁶⁸⁵ *Id.* at 25.

with disabilities in the RSD failed to complete school.⁶⁸⁶ All in all, the class's complaint relates sixty pages of infractions in the RSD.⁶⁸⁷ While many of these problems are undoubtedly unique to post-Katrina New Orleans, the difference between New Orleans and the troubles in other locales is a matter of number, not kind. The situation in New Orleans demonstrates that students with disabilities are at the front lines of education policy and take the worst abuse when systems break down.

Another argument from supporters of privatization in education is that the line between public and private schools has already become blurry.⁶⁸⁸ Because many private schools offer free tuition and public schools in some states are allowed to require admission tests for entry, supporters argue that the discrepancy between private and public is ambiguous.⁶⁸⁹ "Our current language of schooling does not capture the complexity of education today," writes one such advocate.⁶⁹⁰ This argument entirely ignores a central difference between public and private schools: students attending private schools using private money do not receive protection under federal law, while students who attend any school using public money do.⁶⁹¹

Another recent legal fight exemplifies this point. In June of 2011, a consortium of parents and civil rights groups filed a complaint with the Justice Department's civil rights division alleging that the Milwaukee Parental Choice Program discriminates against children with disabilities by "segregating" them in public schools.⁶⁹² The program, which began in 1990, allows students, under specific circumstances, to attend private schools using state money.⁶⁹³ The complaint alleges that Wisconsin's voucher system promotes discrimination, citing evidence that only 1.6% of students attending private schools using state vouchers are enrolled in special education, in contrast to almost 20% of special education students in the traditional public school system.⁶⁹⁴ Despite these concerns, the state plans an expansion of the school choice program, promoted by Governor Scott

⁶⁸⁶ *Id.*

⁶⁸⁷ See generally *Berry*, *supra* note 210.

⁶⁸⁸ Forman, *supra* note 61, at 845.

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.*

⁶⁹¹ 34 C.F.R. § 300.137 (2012).

⁶⁹² Tom Held, *School Choice Program Shuts Out Disabled, Federal Complaint Says*, MILWAUKEE J. SENTINEL, June 7, 2011, available at <http://www.jsonline.com/news/education/123374903.html>.

⁶⁹³ *Milwaukee Parental Choice Program*, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, <http://dpi.wi.gov/sms/choice.html> (last visited Mar. 5, 2013).

⁶⁹⁴ Held, *supra* note 232.

Walker, that would raise income limits of participating students and expand the number of private schools that accept the vouchers.⁶⁹⁵

As online charters run by EMOs continue to gain in popularity, the problems with discrimination seen above in Massachusetts, Washington, New Orleans, and Milwaukee become even more acute. Despite a lack of lawsuits, there are increasing reports that suggest there are major obstacles to the free and appropriate education of students with disabilities in online charter schools. A recent exposé in the New York Times highlighted major improprieties at a number of online schools nationwide.⁶⁹⁶ At Agora Cyber Charter School, run by K12, Inc., for example, achievement is abysmal. At least half of the students are behind in math and/or reading, and a third do not graduate on time.⁶⁹⁷ Hundreds of students withdraw shortly after enrolling, leaving fees for re-takes and equipment behind.⁶⁹⁸ These fees, and other income that includes federal and state taxpayer money, have made the company immensely profitable. Agora's projected profits for the next fiscal year are \$72 million, accounting for ten percent of K12's total revenues.⁶⁹⁹ Yet some teachers at Agora manage as many as 250 students, and the company often collects as much public money as traditional public schools, despite the fact that its facilities costs are much lower.⁷⁰⁰ K12, Inc. also profits by establishing schools in poorer districts in states that provide larger subsidies to areas where a high number of students live in poverty.⁷⁰¹ Yet in one such school, in Tennessee, even though K12, Inc. received the subsidy, only a few of the students enrolled at its school were actually from that county.⁷⁰² This incongruence is a central example of how the outdated legal landscape fails to properly incentivize companies to serve students.

K12, Inc. also spends a great deal less per pupil on special education than traditional public schools.⁷⁰³ Even though the company enrolls students with disabilities at rates not significantly lower than conventional public schools, it serves students with less severe disabilities, and even so, spends substantially less than traditional schools on services for students with disabilities.⁷⁰⁴ In fact, K12 "saves" at least \$500 per pupil when compared

⁶⁹⁵ *Id.*; see also Assemb. B. 40, 2013 Leg., Reg. Sess. (Wis. 2013).

⁶⁹⁶ Saul, *supra* note 16.

⁶⁹⁷ *Id.*

⁶⁹⁸ *Id.*

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.*

⁷⁰² *Id.*

⁷⁰³ *Id.*

⁷⁰⁴ Miron & Urschel, *supra* note 11, at 16.

to traditional public schools.⁷⁰⁵ The company also uses a significant portion of the public money it collects from the government for advertising—approximately \$26.5 million in 2010.⁷⁰⁶ While utilizing incoming money to generate more business is a common strategy in the business world, the practice prompts questions when it draws upon taxpayer funds intended to fund education directly.⁷⁰⁷

Only a few states have ratified laws specifically aimed at regulating online charter schools. A widespread lack of oversight characterizes the current educational landscape in the rest of the United States. For example, a 2008 article, “*Virtual*” Schools: Real Discrimination, by Edward Lin, exposes discriminatory practices at online schools in Washington State.⁷⁰⁸ Lin found discriminatory recruiting, admission policies, and programming in these online schools.⁷⁰⁹ He also found that online schools required significant parental participation in guiding students through lessons, “which necessarily excludes certain types of students.”⁷¹⁰ Many of the schools also failed to provide students with the technology, such as computers, necessary for them to succeed, thus limiting access and reinforcing the “digital divide.”⁷¹¹ In their recruiting practices, the schools discriminated by promoting themselves only in certain sections of the state and in certain newspapers, which had the effect of disregarding bilingual and minority students.⁷¹² And while Washington state law prevents the schools from charging tuition, most schools imposed fees for supplemental materials.⁷¹³

The worst practices of these schools, however, appear to be in special education. For example, while 12.7% of students in Washington public schools receive special education services, the percentage of special education students at three online schools on which Lin focused were 1.0%, 3.1%, and 0.0%.⁷¹⁴ It is also clear that many of these schools simply did not understand their legal duty when it comes to special education. An audit of an online school in Washington called Internet Academy, for example,

⁷⁰⁵ *Id.* at 17.

⁷⁰⁶ Saul, *supra* note 16.

⁷⁰⁷ *Id.*

⁷⁰⁸ Lin, *supra* note 13, at 178–80.

⁷⁰⁹ *Id.* at 185–186.

⁷¹⁰ *Id.*

⁷¹¹ *Id.* at 186.

⁷¹² *Id.* at 187.

⁷¹³ Lin, *supra* note 13, at 190.

⁷¹⁴ *Id.* at 184 (citing figures from the Washington public education department).

found that the school did not provide individualized learning plans or track student hours.⁷¹⁵ Even more egregiously, as Lin reported, "in a survey of two well-established online schools and two state education agencies, one interviewee stated that parents need to be prepared to spend 'a good five-and-a-half hours per day really providing support for their [disabled] child'."⁷¹⁶ Relying on parents to provide special education services is illegal.⁷¹⁷ These kinds of practices likely continue, however, because of a combined lack of knowledge on the part of school administrators and parents, and because of the mistaken perceptions, perpetuated by the school choice movement, that certain schools are simply not equipped for certain students.⁷¹⁸ As Lin writes, "school administrators . . . should bear the burden of justifying the disparate impact on certain types of students, including those requiring special education If online schools cannot justify their practices and policies, then they should not qualify for public school funding."⁷¹⁹

VI. SPECIAL EDUCATION AND SCHOOL CHOICE: DIVERGENT PHILOSOPHIES

To understand the reasons this discrimination is occurring, it is necessary to recognize the divergent philosophies of the school choice and special education movements. Modern special education developed almost simultaneously to the charter school era. In 1975, the United States Congress, based on findings that more than 4 million children with

⁷¹⁵ *Id.* at 182.

⁷¹⁶ *Id.* at 187, n. 82.

⁷¹⁷ See 20 U.S.C. § 1412(a)(1)(A)–(B) (2004).

⁷¹⁸ See, e.g., jane100000, Comment to *Advocates Accuse D.C. Charter Schools of Excluding the Disabled*, WASH. POST (May 13, 2011) http://articles.washingtonpost.com/2011-05-13/local/35263131_1_charter-schools-charter-sector-public-education-options ("It makes no sense to vilify charters for limiting [their] role to what they were intended to do."). This understanding of our charter schools treats them as though they were private institutions and again reflects the marketization ideals many in the business community have popularized. This attitude is further exemplified in the assumptions about who will use online schools. An education scholar identified the skills that lead to student success in online educational courses:

1. Be able to be open minded about sharing life, work, and educational experiences as part of the learning process; 2. Be able to communicate through writing; 3. Be self-motivated and self-disciplined; 4. Be willing to "speak up" if problems arise; 5. Be willing and able to commit to four to fifteen hours per week per course; 6. Be able to meet the minimum requirements for the program; 7. Be accepting of critical thinking and decision making as part of the learning process; 8. Be able to access to a computer and modem; 9. Be able to think through ideas before responding; 10. Be of the opinion that high quality learning can take place without going to a traditional classroom.

Brady et al., *supra* note 155, at 204–05. It is hard to see how most of the skills identified are meant to apply to students with severe disabilities.

⁷¹⁹ Lin, *supra* note 13, at 188.

disabilities were being denied equal educational opportunity,⁷²⁰ ratified the Education for All Handicapped Children Act (“EAHCA”). Congress found that more than one million children with disabilities had been fully denied access to public education, and in many instances parents of these children were forced to seek help outside the public education system, often at great expense.⁷²¹ EAHCA was the first comprehensive law mandating affirmative obligations on the part of states and public schools with regard to people with disabilities.⁷²² Passage of the EAHCA reflected the conclusion that there was an important role for the federal government in regulating, through cooperation with the states, the provision of services to students with disabilities.⁷²³ The EAHCA has gone through two major revisions—in 1990, as the Individuals with Disabilities Education Act (“IDEA”),⁷²⁴ and in 2004, as the Individuals with Disabilities Education Improvement Act (“IDEIA”).⁷²⁵ But its central tenets have remained intact.⁷²⁶

The IDEIA defines a disability to include intellectual impairments, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities.⁷²⁷ It ensures that eligible children receive a free, appropriate public education (“FAPE”) consistent with their educational needs.⁷²⁸ A FAPE encompasses the regular and special education needs of students, including evaluation, placement, and procedural safeguards.⁷²⁹ Schools are additionally obligated to identify and serve students not previously classified as eligible for

⁷²⁰ NEW AMERICA FOUNDATION, *Individuals with Disabilities Education Act Overview* (Mar. 26, 2012), available at <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-overview>.

⁷²¹ U.S. OFFICE OF SPECIAL EDUCATION PROGRAMS, *History: Twenty-Five Years of Progress In Educating Children with Disabilities Through Idea* (Jul. 19, 2007) available at <http://www2.ed.gov/policy/speced/leg/idea/history.html>.

⁷²² Garda, *supra* note 30, at 669.

⁷²³ NEW AMERICA FOUNDATION, *supra* note 260.

⁷²⁴ Anurima Bhargava et al., *The Right Idea: A Critical Look inside the Individuals with Disabilities Education Act (IDEA), its Effectiveness and Challenges, and the Role of the Lawyer in its Protection and Enforcement* (2012), available at http://www.americanbar.org/content/dam/aba/administrative/-litigation/materials/2012_aba_annual/6_1.authcheckdam.pdf.

⁷²⁵ *Id.* at 2.

⁷²⁶ *Id.* at 1–2.

⁷²⁷ 20 U.S.C. § 1401(3)(A)(i) (2010).

⁷²⁸ 20 U.S.C. § 1412(a)(1)(A) (2004).

⁷²⁹ *Id.* IDEIA is one of three major statutes designed to protect people with disabilities. The other two are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1998), and the Americans with Disabilities Act, 42 U.S.C.A. § 12101 et seq. (2009).

special education services.⁷³⁰ If a school cannot provide a FAPE to a special education student, it must pay for that student to attend another school—whether public or private—that can.⁷³¹

The IDEIA requires states to establish substantive and procedural due process rights for students with disabilities and create goals that specify the personnel, facilities, and funding allocations necessary to achieve a FAPE.⁷³² States and local districts must maintain clear and available documentation of these plans.⁷³³ Special education is administered through the creation of an Individualized Education Program (“IEP”) for each student with an identified disability.⁷³⁴ An IEP is a highly detailed road map for teachers and school personnel to follow in instructing special education students.⁷³⁵ It may contain statements about the child’s present levels of academic achievement and functional performance, including how her disability affects her involvement and progress in the general education curriculum; measurable annual goals; narratives regarding progress towards meeting the annual goals; a list of related services and supplementary aids and services provided to her; an explanation of the extent to which she will or will not participate with non-disabled children in regular school activities; an inventory of curriculum modifications necessary to measure her performance on state and district-wide assessments; the projected dates and frequencies for the duration of the services and modifications; and a list of her postsecondary goals.⁷³⁶ Properly administering IEPs takes an enormous amount of work on the part of teachers, administrators, and parents.⁷³⁷ For many education professionals, the requirements of special education seem to absorb an unfairly disproportionate amount of time.

Yet despite the challenges to effectively practicing special education, the fundamental premises of the IDEIA comport with traditional American ideals of democracy and the eradication of discrimination.⁷³⁸ The IDEIA mandates that,

⁷³⁰ 20 U.S.C. § 1412(a)(3) (2005).

⁷³¹ *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

⁷³² 34 C.F.R. § 104.33–104.33 (2000).

⁷³³ 34 C.F.R. § 104.33–104.35 (2000).

⁷³⁴ 20 U.S.C. § 1414 (2005); 34 C.F.R. § 300.324 (2006).

⁷³⁵ 20 U.S.C. § 1414; 34 C.F.R. § 300.324.

⁷³⁶ 20 U.S.C. § 1414(d)(1)(A)(i) (2006).

⁷³⁷ I can attest personally to the hard work involved in maintaining IEPs, having taught in a charter school for four years. At my school, all teachers of a given student were required to attend her IEP. Some teachers at my school had to attend as many as twenty IEP meetings in a given year.

⁷³⁸ See *Garda*, *supra* note 30, at 669–70.

[t]o the maximum extent appropriate, children with disabilities... are educated with children who are not disabled, and... removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁷³⁹

All schools must use a “continuum of services” to ensure the schools meet the needs of each student, as outlined in the IEP.⁷⁴⁰ These services can include mainstreaming all students with disabilities by placing them in regular education classrooms, as well as a range of additional services like home instruction, special classes, or supplementary instruction.⁷⁴¹ Most charter schools employ the full inclusion model, but many struggle to provide the additional services necessary to constitute a FAPE.⁷⁴² As scholar Mark Weber writes, “[s]pecial education is not a place to put children; it is a bundle of services to assist them to hold their own educationally.”⁷⁴³ Many charters have limited capacity to offer more than basic inclusion.⁷⁴⁴

One reason charter schools struggle with the provision of special education services is that many are one-school Local Educational Agencies (“LEAs”).⁷⁴⁵ Special education law dictates that each LEA must serve each special education student under its purview.⁷⁴⁶ Traditionally, an LEA is a school district. Thus, under the IDEIA, if a student with an IEP enrolls in a school that does not possess adequate resources to fulfill that IEP, the district (LEA) may transfer the student to another school within the district that can carry it out.⁷⁴⁷ Legally, the schools are interchangeable.⁷⁴⁸ Districts often take advantage of their size and distributed resources to share the collective costs of special education.⁷⁴⁹ As LEAs, districts can pool specialized resources, such as specially trained teachers and equipment, at a

⁷³⁹ 20 U.S.C. § 1412(d)(1)(A)(i).

⁷⁴⁰ Garda, *supra* note 30, at 690.

⁷⁴¹ *Id.* at 699.

⁷⁴² *Id.* at 690–91.

⁷⁴³ See Weber, *supra* note 31, at 222.

⁷⁴⁴ *Id.* at 222.

⁷⁴⁵ *Id.* at 237. In most states, it is state-chartered, rather than district-chartered schools, who are their own LEAs.

⁷⁴⁶ *Id.*

⁷⁴⁷ See Garda, *supra* note 30, at 711.

⁷⁴⁸ *Id.* at 678.

⁷⁴⁹ *Id.* at 678–79.

few schools in the LEA and compel attendance of students with certain severe disabilities there.⁷⁵⁰

Because some charter schools are not part of a larger LEA/district, under the law these schools must cater to every student who enrolls, no matter the financial burden.⁷⁵¹ As such, these charter schools are not able transfer students to any other school.⁷⁵² Students with severe disabilities cost more to educate than other students, and their presence may mean that a charter will have to make large-scale purchases of therapy equipment or enter expensive contracts with private providers of special education.⁷⁵³ The financial pressure of enrolling students with severe disabilities threatens some schools' very existence. According to a 2002 report from the President's Commission on Excellence in Special Education, "the greatest concerns about costs for local districts are derived from high-need children with significant disabilities who require expensive placements within and outside of the district. Critical shortages of qualified staff in special education exacerbate these concerns."⁷⁵⁴

Although the IDEIA prioritizes funding for students with the most severe disabilities, LEAs with high numbers of students with severe disabilities may have less money available for other special education and non-special education students.⁷⁵⁵ The IDEIA also does not provide supplementary funds to offset the fiscal shock on LEAs of providing a FAPE to children with especially high needs.⁷⁵⁶ Indeed, federal funds have never covered the full costs of special education.⁷⁵⁷ The maximum funding permitted under IDEIA is 40% of the average cost of educating a child without disabilities, but Congress has never provided full support even at that level, leaving the remaining portions to state and local funding sources.⁷⁵⁸ To make up for the gaps in dollars, some states have established shared funds that local districts can tap into when necessary to offset the high costs of properly educating

⁷⁵⁰ *Id.* This model of efficiency has significant parallels with the economies of scale utilized by companies like K12, Inc. The irony is that private companies running schools distributed across the United States share in many efficiency advantages, but pooling special education services is not one of them. There is simply no way to administer the most expensive special education services over the web.

⁷⁵¹ Weber, *supra* note 31, at 237.

⁷⁵² *Id.* at 222.

⁷⁵³ *Id.* at 241.

⁷⁵⁴ PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., U.S. DEPT. OF EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 32 (2002) [hereinafter PRESIDENT'S COMMISSION].

⁷⁵⁵ *See id.*

⁷⁵⁶ *Id.*

⁷⁵⁷ Weber, *supra* note 31, at 241.

⁷⁵⁸ 20 U.S.C. § 1411(a)(2)(ii) (2006); Weber, *supra* note 31, at 242 n.121.

students with severe disabilities, but many states have not.⁷⁵⁹ EMOs committed to properly adhering to special education law must maintain their own funding sources in case they see high incidences of students with severe disabilities enrolling at their schools. Because charter schools are public, private companies may not cherry pick their students or deny students enrollment based on their cost to educate or their identity as disabled.⁷⁶⁰ The financial burden faced by privately run public schools with high numbers of students with severe disabilities is compounded by the imbalance of funding for all charter schools described above in Section IV.

Legal scholar Robert Garda, Jr., calls the philosophical divide between school choice and special education a “culture clash.”⁷⁶¹ The strong civil rights backbone to special education law is directly at odds with the school choice movement’s preference for efficiency, accountability, and outcomes.⁷⁶² Congress ratified the IDEIA in an era where the goal was to provide equal access to the educational system, not to ensure certain results.⁷⁶³ Special education laws “simply do not allow the federal government to assess states’ compliance with outcome measures, such as disabled students’ graduation rates or performance on standardized tests.”⁷⁶⁴ This more nebulous form of measuring success contrasts sharply with the current political preference to measure every school and every teacher by tests scores. Further, special education law is compliance-based rather than outcome-based – it favors inputs over outputs.⁷⁶⁵ The goal of special education is to ensure that schools are properly following procedures that cannot be measured on tests; a number of courts have held that non-compliance with IDEIA procedures is the equivalent of the denial of a FAPE.⁷⁶⁶

⁷⁵⁹ PRESIDENT’S COMMISSION, *supra* note 294, at 32–33.

⁷⁶⁰ 34 C.F.R. § 104.4(a) (2012).

⁷⁶¹ See generally Garda, *supra* note 30.

⁷⁶² *Id.* at 688–89. The language of special education often overlaps with that of the civil rights movement: both speak of discrimination, access, and segregation.

⁷⁶³ *Id.* at 669–70.

⁷⁶⁴ *Id.* at 676.

⁷⁶⁵ *Id.* at 676–77.

⁷⁶⁶ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982) (“[T]he ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”); see also Garda, *supra* note 30, at 675 n. 84 (citing *Babb v. Knox Cnty. Sch. Sys.*, 965 F.2d 104, 108 (6th Cir. 1992); *W.G. v. Bd. of Tr. of Target Range Sch. Dist.*, 960 F.2d 1479, 1485 (9th Cir. 1992); *Spielberg ex rel. Spielberg v. Henrico Cnty. Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988); *Bd. of Educ. of Cnty. of Cabell v. Dienelt*, 843 F.2d 813, 814–15 (4th Cir. 1988); *Jackson v. Franklin Cnty. Sch. Bd.*, 806 F.2d 623, 629 (5th Cir. 1986); *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)).

Despite the shift with the passage of NCLB to a federal educational system heavily premised on outcomes and results, special education law remains focused on an older model. It compels a school to adjust to the child rather than the child to the school.⁷⁶⁷ It also presages collective responsibility over school autonomy.⁷⁶⁸ Congress ratified the original EAHCA in an era when centralized authority was more highly valued than independence, and these principles still undergird special education law today.⁷⁶⁹ As a result, compliance with special education remains onerous, a “complex maze of procedures and paperwork that is difficult to navigate and implement.”⁷⁷⁰ The amount of red tape required to properly adhere to special education law undoubtedly drives some EMOs away from special education. In fact, special education law represents the precise type of governing most anathema to private industry: it is a centrally administered federal imposition heavy on bureaucracy, and it exists to protect a tiny percentage of marginalized people who drive up costs, sue often, and demand outsized attention. It appears that rather than taking the necessary time and resources to fully understand special education law, however, many cyber charters simply choose to ignore it.

VII. MOVING FORWARD: RECOMMENDATIONS AND CONCLUSIONS

The improprieties at the intersection of special education and privatized education represent more than aberrations or the missteps of a few bad actors. Rather, they expose deep rifts in the public education landscape that need to be addressed head-on. Unfortunately, reformers with ambitious ideas about how to overhaul the system easily ignore students with severe disabilities. While it may be true that many “schools have been quite good about ensuring that online programs are available to students with disabilities,” the data available show that widespread and systematic discrimination persists.⁷⁷¹

A basic set of changes will improve the educational landscape. First, every state should begin the process of creating law, whether administrative or legislative, that specifically spells out the boundaries and limits, rights and obligations of online charter schools. Central to this policy should be

⁷⁶⁷ Garda, *supra* note 30, at 679.

⁷⁶⁸ *Id.* at 680.

⁷⁶⁹ *Id.* at 669–70.

⁷⁷⁰ *Id.* at 677.

⁷⁷¹ John F. Watson, *A National Primer on K-12 Online Learning*, NORTH AM. COUNCIL FOR ONLINE LEARNING, at 8–9 (2007), available at http://www.inacol.org/cms/wpcontent/uploads/2012/11/iNACOL_NationalPrimerV1_2007.pdf.

guidance on how to successfully implement special education, and steep requirements for new charters looking for authorization.⁷⁷² In addition, any cyber charter law should contain strict provisions for reporting and publicizing the special education approach each school employs. If we start to understand education as part of consumer law, it may be easier to recognize how disclosure requirements in education might parallel successful regulation in the financial services industry.

The current tendency of all private companies to guard their internal information obscures the full extent of these problems, and serves neither students with disabilities nor the companies themselves.⁷⁷³ EMOs appear to want fewer restrictions imposed on them from government, yet their business models are almost entirely predicated on the continual flow of federal money to their bank accounts. To parse a phrase, they want to eat their cake, but they don't want to pay for it. If EMOs are accepting public financing, they owe the public a duty to demonstrate that they are spending it in ways that serve *all* Americans, as the law mandates. Maintaining the level of secrecy to which most companies cling lends credence to the assumptions of outsiders that private companies are assuring themselves huge profit margins, ignoring improprieties, or misusing public money.⁷⁷⁴ Until EMOs can demonstrate that they are ready to uphold their end of the bargain under special education law, we should hesitate before authorizing more cyber charters, especially those that are for-profit and operating as their own LEAs.

When we continue to promote for-profit online schools in the face of widespread evidence of systematic discrimination, we send a message that it is okay to marginalize special education students. By ignoring this

⁷⁷² See Robert Nott, *State Panel Turns Down Virtual Charter Sch. Bid*, SANTA FE NEW MEXICAN, Sept. 20, 2012, available at <http://www.sfnewmexican.com/Local%20News/092112charterschool#.-UWT8gZOG2ws> (discussing a group's application to open a cyber charter school that was recently denied in New Mexico due to concerns about special education implementation, among other issues).

⁷⁷³ There is little available data on students with severe disabilities in online charter schools. I could find no scholarly articles examining special education in online public schools, and most of the literature is provided by the EMOs or their advocacy organizations. Nearly all of these reports and descriptions mention that the provision of special education services is a significant issue for online schools, then either tout the advantages to students with minor to moderate disabilities (ADD, learning disabilities, social anxiety), or make vague pronouncements that great care must be taken to assure access to all. If EMOs want to be seen as real educators and not just businesses, this must change.

⁷⁷⁴ Trotter et al., *supra* note 128, at 949; see also Mary Bailey Estes, *Choice for All? Charter Schools and Students with Special Needs*, 37 J. SPECIAL EDUC. 257, 261 (2004) (discussing widespread underreporting of IEP information in the Texas charter schools; where Estes did find data, it showed an under-enrollment of special education students in Texas charter schools. A lack of transparency may be another reason, unfortunately, that these schools avoid lawsuits.).

ongoing crisis, we implicitly support the notion that profits are king. As Mary Bailey Estes writes, “if an appropriate education within a choice context is available to some, it must be available to all. Students with disabilities and their parents have a right not only to equal access but also to quality, comprehensive, effective programming.”⁷⁷⁵ This is true no matter whether these students attend charter schools or traditional public schools, and regardless of who pockets special education funds.

Even with massive problems at privatized online schools, the collective goal of effectively practicing special education does not come down to who runs schools per se, but to our priorities as a nation. No actor, whether federal, state, local, or private, is entirely immune from cutting corners or engaging in objectionable practices. Our priorities in making policy should be to students, not to ideologies. In an interesting recent development, charter schools, recognizing the financial burdens they take on by insisting on self-control, started to form “special education cooperatives” to pool resources (such as speech pathologists, school psychologists, and assessment specialists) in order to share the cost of special education services.⁷⁷⁶ In setting up collectives, charters with large numbers of students who are expensive to educate are implicitly acknowledging the benefits of the traditional public school system. Special education scholars and charter school advocates now recommend that

for purposes of implementing IDEA, charter schools need to be connected in some way with a special education infrastructure Access to the necessary expertise, provided in a way that does not compromise the autonomy of the charter school and its mission, is essential to ensure appropriate services for students with disabilities and protect the charter schools from the serious consequences of avoidable non-compliance.⁷⁷⁷

While taking advantage of economies of scale is a core philosophy of corporate education, the efficient pooling of resources and the collective sharing of burdens are also some of the central strengths of the traditional public education system. The fact that “charter schools have begun to operate in a manner increasingly similar to traditional public schools with regard to students with special needs” calls into question the need for two separate public school systems.⁷⁷⁸ Why have two separate systems with

⁷⁷⁵ Estes, *supra* note 174, at 265.

⁷⁷⁶ *Id.* at 217.

⁷⁷⁷ Eileen Ahearn, *Public Charter Schools and Students with Disabilities*, COUNCIL FOR EXCEPTIONAL CHILDREN (2001), available at <http://www.cec.sped.org/AM/Template.cfm?Section=Home&-TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2236> (last visited Mar. 4, 2013).

⁷⁷⁸ Mary Bailey Estes, *Charter Schools: Do They Work for Troubled Students?*, 51 PREVENTING SCH. FAILURE 55, 59 (2006).

similar needs and funding streams that compete for resources? The continued creation of for-profit online charters funded with public money that only cater to certain students presents ethical, moral, and practical challenges to our national identity. If the current model persists, traditional public schools will be left with the students most expensive to educate, and the system will be in danger of collapse under its own weight.⁷⁷⁹

Charter schools continue to enjoy huge support from the Obama administration and from advocates on the left and the right.⁷⁸⁰ Many charter schools do excellent work, including with students with disabilities. But gaps in funding threaten their existence, and the recent increase in lawsuits over special education place additional strains on revenue streams. This puts the country's public education system in an uncomfortable paradox. As we set up what is in effect a parallel system, we vest it with only some of the tools it needs to succeed. Charter school advocates couch the resistance to full funding and support of charter schools as a reflexive refusal to accept innovation and creative new approaches.⁷⁸¹ Union advocates and education policy scholars see the increasing presence of charter schools as a strain on resources and a way to hollow out the community core of traditional public schools.⁷⁸² They question the wisdom of this new system. But both groups agree that the emerging structure is not efficient. In a fiscal landscape facing increasing cuts to public education funding at all levels, burdens from state pension systems, and widening income stratification, maintaining two public education systems makes little sense.⁷⁸³ As Robert Garda, Jr., puts it, "[c]harter schools' violations of disabled students' civil rights undermine not only their viability and validity, but also that of the entire public education system."⁷⁸⁴

Moreover, whether one supports the education innovations of the corporate reform movement or not, it is important to think about whether we are asking the right questions about education in this country. Teaching is enormously difficult in any educational environment and to overlay a school structure that is concerned primarily about its bottom line makes our results worse. What was once a focus on curriculum and schools as community centers has devolved into an obsession with measurement and

⁷⁷⁹ Garda, *supra* note 30, at 717.

⁷⁸⁰ *Id.* at 658.

⁷⁸¹ *Id.* at 702.

⁷⁸² *Id.* at 707.

⁷⁸³ *Id.* at 708–09.

⁷⁸⁴ *Id.* at 717.

immediate results. The rise in virtual charter schools would likely not have been possible without the rigorous testing regime brought forth by education reformers in the second half of the twentieth century, codified in NCLB, and now embedded in the core of American education. What has been forgotten is, as Diane Ravitch elucidates, the ability to see every student as “a person of endless potential. Not rated by his or her test scores. Not defined by his or her family demographics. But as a person who is growing, developing, in need of adult guidance, in need of challenging and liberating education, an education of possibilities and passion.”⁷⁸⁵ We have little excuse to be so far behind this mission in 2012.

Even by 1988, when Albert Shanker made his groundbreaking speech, the tendency of the American school to rely on standardized tests to measure student learning was already at a breaking point. Shanker railed against the “repeating and regurgitating things back on standard examinations” that was rampant at the time.⁷⁸⁶ He lamented the loss of creativity and claimed that “the kids who do the best on these tests are not necessarily people who later on in life make the greatest contributions to society,” citing the examples of Edison, Churchill, and Einstein.⁷⁸⁷ Even *A Nation at Risk* pointed to a lack of creativity and an absence of “higher order” intellectual skills.⁷⁸⁸ Sadly, since *A Nation at Risk*, the nation has only increased its focus on test scores, but has nonetheless been unable to raise them significantly.⁷⁸⁹

In 1955, Milton Friedman had a vision of the American school as a center of “[a] stable and democratic society,” where education contributes to “widespread acceptance of some common set of values and . . . a minimum degree of literacy and knowledge on the part of most citizens.”⁷⁹⁰ Friedman, perhaps history’s most influential libertarian thinker, saw a world in which “the education of my child contributes to your welfare.”⁷⁹¹ Ronald Reagan’s Commission on Educational Excellence echoed these concerns in 1983, writing:

All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the

⁷⁸⁵ RAVITCH, *supra* note 104, at 288.

⁷⁸⁶ Shanker, *supra* note 1, at 14-15.

⁷⁸⁷ *Id.* at 15.

⁷⁸⁸ *Nation at Risk*, *supra* note 82, at 11.

⁷⁸⁹ See, e.g., Nation’s Report Card, *Mathematics Scores for 9- and 13-Year-Olds Higher Than in All Previous Assessment Years*, http://nationsreportcard.gov/ltr_2008/ltr0002.asp?subtab_id=Tab_3&-tab_id=tab1#chart (last viewed Dec. 14, 2012).

⁷⁹⁰ Friedman, *supra* note 39.

⁷⁹¹ *Id.*

utmost. This promise means that all children by virtue of their own efforts, competently guided, can hope to attain the mature and informed judgment needed to secure gainful employment, and to manage their own lives, thereby serving not only their own interests but also the progress of society itself.⁷⁹²

Today, the notion that schools are places to develop young people has been co-opted by the ambitions of business. This is not a standard battle between liberals and libertarians over the role of government in education. The clash here is more about the ways in which we protect our citizens and about the definition of a free education for all. The solution to the culture clash between the mission and identity of charter schools and the goals and ideals of special education may not be simply a tweak—it may require a system overhaul. The original idea of charter schools, after all, was to bring together teachers, administrators, and school authorizers in the name of productive education, to “creat[e] a safe, positive climate in which students can learn and grow.”⁷⁹³ It is time to return to this grand concept.

⁷⁹² *Nation at Risk*, *supra* note 81, at 9.

⁷⁹³ Budde, *supra* note 72, at 520.

COMMENTS

RECLAIMING *HAZELWOOD*: PUBLIC SCHOOL CLASSROOMS AND A RETURN TO THE SUPREME COURT'S VISION FOR VIEWPOINT-SPECIFIC SPEECH REGULATION POLICY

Brad Dickens^{***}

Federal and circuit courts continue to fiercely debate whether the Supreme Court's 1988 ruling in *Hazelwood v. Kuhlmeier* requires school policies regulating student speech and expression to be viewpoint neutral. However, this note suggests that the language of *Hazelwood* itself shows that the Circuit debate may be misguided. The Supreme Court intended *Hazelwood* to stand as a narrow exception to its earlier holding in *Tinker*, and *Hazelwood* only applies in instances where the government's own voice is implicated, largely in a public context. When the school, and in effect the government, is speaking with its own voice, the school must be able to control the content and nature of such speech as a matter of practicality. Any requirement of viewpoint neutrality in this context is simply unnecessary and conflicts with the Court's own precedent relating to government speech. When schools are allowed to operate the way *Hazelwood* intended, they are able to effectively execute their educational mission, and students are able to appropriately exercise their First Amendment rights via *Tinker* without the overly cumbersome burden of viewpoint neutral speech policies.

I. INTRODUCTION

The public school classroom is on the front lines in the battle of defining the First Amendment. Almost daily, new cases and incidents arise that probe the outer bounds of the First Amendment and the authority of schools to regulate student speech. In Tampa, Florida, in 2012, an elementary school principal prohibited a fourth grade student from distributing invitations to his classmates for an Easter egg hunt.⁷⁹⁴ In Oklahoma City, a

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⁷⁹⁴ William R. Levesque, *School Sued for Blocking Egg Hunt Flier*, TAMPA BAY TIMES, Aug. 22, 2012,

five-year-old student was forced to take off his shirt on the playground and turn it inside out because it was a University of Michigan shirt and violated the school's policy of only allowing University of Oklahoma or Oklahoma State University shirts.⁷⁹⁵ In Prague, Oklahoma, a high school valedictorian had her diploma withheld indefinitely for saying "hell" in her graduation speech.⁷⁹⁶ In Kountze, Texas, a high school found itself in federal district court over a district policy prohibiting the cheerleading squad from displaying a banner that read, "If God Is For Us, Who Can Be Against Us."⁷⁹⁷ Administrators, teachers, parents, and students in districts and communities across the nation struggle to understand and apply school speech policies that comply with the parameters of the First Amendment.

In 1969, the Supreme Court in *Tinker v. Des Moines* made an effort to define the scope and character of the First Amendment in a classroom context. *Tinker* produced the oft-quoted dictum that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate."⁷⁹⁸ *Tinker* remains a foundational case for school-related speech, and yet its language leaves ambiguities in the analytical framework that cannot be ignored. Just how far does the "schoolhouse gate" go? What precisely is a school's educational mission?

In *Hazelwood v. Kuhlmeier*, the Court supplemented the foundational rule from *Tinker* to answer another difficult question left open by *Tinker*: how far can schools go in restricting speech on campus when the speech appears to carry the school's approval (as in a school newspaper), rather than being a clearly private communication (as in a student wearing an armband in protest)?⁷⁹⁹ The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns".⁸⁰⁰

available at <http://www.tampabay.com/news/courts/civil/lawsuit-alleges-hillsborough-school-blocked-free-speech-religious/1247240>.

⁷⁹⁵ Carrie Coppennoll, *District to Review Dress Code after Boy, 5, Told to Fix Shirt*, OKLAHOMAN, Aug. 21, 2012, available at <http://newsok.com/okc-schools-to-review-dress-code-after-kindergartner-told-to-turn-shirt-inside-out/article/3703012>.

⁷⁹⁶ Emmeline Zhao, *Kaitlin Nootbaar, Oklahoma High School Valedictorian, Denied Diploma For Using 'Hell' In Speech*, HUFFINGTON POST, Aug. 20, 2012, http://www.huffingtonpost.com/2012/08/20/-kaitlin-nootbaar-oklahoma_n_1808618.html.

⁷⁹⁷ Chris Tomlinson, *Judge Rules for Cheerleaders*, HUFFINGTON POST, Oct. 18, 2012, http://www.huffingtonpost.com/2012/10/18/judge-rules-for-cheerlead_0_n_1981865.html.

⁷⁹⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁷⁹⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988).

⁸⁰⁰ *Id.* at 273.

The language of the Court's opinion leaves unanswered the question of whether school policies may restrict speech on the basis of a specific viewpoint or must instead remain viewpoint neutral.⁸⁰¹ This issue is fiercely debated among the circuits and carries with it significant implications for the boundaries of speech rights of students in American classrooms.⁸⁰²

This note surveys the body of circuit case law on school viewpoint neutrality, and ultimately to makes a case in favor of reading *Hazelwood* to authorize viewpoint-specific speech restrictions.

First, *Hazelwood*, by its own language, applies only to speech that could be interpreted as government-endorsed; it acts as a narrow exception to the general rule from *Tinker*, rather than a new separate standard for public school policy.⁸⁰³ Given *Hazelwood*'s position as a narrow exception triggered only when the government's own imprimatur is implicated circumstantially, a viewpoint neutrality standard is incompatible with the justification for *Hazelwood*'s exception. The government may, and inevitably does, convey and endorse viewpoints, and it has an interest in maintaining integrity and singularity in its voice. Thus, a public school may regulate certain student speech *precisely because of the viewpoint of that speech* when it is reasonably perceived as carrying the school's endorsement.⁸⁰⁴ *Hazelwood* recognizes that schools have an interest in maintaining their own messaging as they carry out their educational function.

Second, this note argues that the actual operation of a viewpoint neutrality requirement perversely incentivizes either a neglect of legitimate speech regulation or unnecessarily broad and inefficient prohibitions on speech, which would yield greater burdens on individual discourse than would result from viewpoint-focused regulation. When schools control

⁸⁰¹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001) ("[I]t is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination"); Denise Daugherty, *Free Speech in Public Schools: Has the Supreme Court Created a Haven for Viewpoint Discrimination in School-Sponsored Speech?*, 20 GA. ST. U. L. REV. 1061, 1062 (2004); Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 90 (2008).

⁸⁰² *Good News Club*, 533 U.S. at 113; Daugherty, *supra* note 8, at 1062; Waldman, *supra* note 8, at 90.

⁸⁰³ *Hazelwood*, 484 U.S. at 272–73 ("[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.").

⁸⁰⁴ Alexis Zouhary, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 NOTRE DAME L. REV. 2227, 2235–36 (2008) ("[T]he only area in which the government may unequivocally make viewpoint-based distinctions is when it is the speaker.").

speech over concerns of school endorsement of certain messages, viewpoint-neutral regulation is too blunt an instrument, unnecessarily censoring benign speech outside the scope of the concerns that gave rise to regulation. By contrast, viewpoint regulation within the bounds of *Hazelwood* allows schools to identify speech that is especially problematic, restricting only what is necessary to allow the school to maintain the integrity of its pedagogical voice.

II. HAZELWOOD'S FOUNDATION

In 1983, the principal of Hazelwood East High School removed several pages from the final draft of *Spectrum*, the high school student newspaper.⁸⁰⁵ Of concern to the principal were two articles on teen pregnancy and divorce, both of which contained interviews with students from the high school.⁸⁰⁶ The principal decided that there was not enough time to edit the objectionable portions of the stories before the paper went to print, so he chose to remove the two articles entirely in an effort to maintain the deadline.⁸⁰⁷ Students in the journalism class responsible for the articles brought an action against the school alleging that it had violated their First Amendment rights.⁸⁰⁸ The district court found that the principal had a "legitimate and reasonable concern" that readers would be able to easily discern the identities of the anonymous students mentioned in the article.⁸⁰⁹ The district court affirmed this by holding the school had the right to censor the speech based on its belief that the articles could be interpreted as the school's endorsement of certain sexual norms.⁸¹⁰

The Eighth Circuit reversed the decision.⁸¹¹ Applying *Tinker*, the circuit court held that the school had established a public forum through the newspaper, and as such, the school could only restrict speech that substantially interfered with school operations.⁸¹²

The Supreme Court reversed.⁸¹³ The Court began its opinion with a tip of the hat to its holding from *Tinker*, acknowledging that the First Amendment

⁸⁰⁵ *Hazelwood*, 484 U.S. at 263–264.

⁸⁰⁶ *Id.* at 263.

⁸⁰⁷ *Id.* at 263–64.

⁸⁰⁸ *Id.* at 264.

⁸⁰⁹ *Id.* at 264–65.

⁸¹⁰ *Id.*

⁸¹¹ *Hazelwood*, 484 U.S. at 265.

⁸¹² *Id.*; see also *Tinker*, 393 U.S. at 508.

⁸¹³ *Hazelwood*, 484 U.S. at 266.

extends into schools, but noting that the school environment is a unique one for civil liberties.⁸¹⁴

Early in the opinion, the Court critically established that a school newspaper is not a public forum, but did not go so far as to label the paper a *non-public forum*.⁸¹⁵ The Hazelwood School District did not open the school newspaper up to “indiscriminate use” by the student body, choosing instead to maintain the intellectual space of the paper as an outlet for student learning within the context of a graded journalism class.⁸¹⁶ Though the Court applied the “policy or practice” standard from *Perry Education Association v. Perry Local Educators’ Association* to defeat any argument that the paper is a classic public forum, it stopped short of giving it non-public forum status with that classification’s accompanying requirement of viewpoint neutrality.⁸¹⁷ This odd designation gave rise to the circuit conflict explored herein.

The Court further clarified the departure from *Tinker* later in the opinion, holding that *Tinker* does not require that its standards apply to speech that could be seen as being officially endorsed by the school.⁸¹⁸ In other words, there is a difference between the effects of students expressing their views as individuals and students speaking in a manner that appears to represent the school (*i.e.*, the government).

Writing for the majority, Justice White explained that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁸¹⁹ However, the “pedagogical concern” standard only represents half of the complete *Hazelwood* authorization. This form of editorial control of speech is only authorized when there is a reasonable perception that the speech to be regulated bears the school’s imprimatur.⁸²⁰ These elements *together* form the *Hazelwood* rule.

⁸¹⁴ *Id.*

⁸¹⁵ *Id.* at 267; Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 772–73 (2009).

⁸¹⁶ *Hazelwood*, 484 U.S. at 270.

⁸¹⁷ *Id.* at 269.

⁸¹⁸ *Id.* at 269 n.2.

⁸¹⁹ *Id.* at 273.

⁸²⁰ *Hazelwood*, 484 U.S. at 270.

III. HAZELWOOD'S LEGACY

The American legal community has viewed the Court's decision in *Hazelwood* as both controversial and polarizing.⁸²¹

Beneath the pedagogical concern standard lies an important but ultimately unanswered question: must school policies restricting speech, while still connected to a pedagogical concern, also be viewpoint neutral? Earlier opinions from the Supreme Court in *Perry*⁸²² and *Cornelius*⁸²³ established a viewpoint neutrality requirement for policies controlling speech in a nonpublic forum. This precedent would normally be controlling without much controversy, but the Court had already spent a great deal of time and text noting that a public school classroom is a different environment and context than "the real world" of the rough and tumble public square.⁸²⁴ Do *Perry* and *Cornelius* apply to classroom policies, or is *Hazelwood*'s silence on viewpoint neutrality indicative of a new rule uniquely tailored to the school context?

IV. THE CIRCUIT SPLIT

Circuit Courts remain divided on whether *Hazelwood* requires viewpoint neutrality for school district policies on student speech like those in the case. Some circuits have interpreted the Court's holding in *Hazelwood* as a kind of special exception to viewpoint neutrality, allowing schools to zero in on specific messages in an effort to, for instance, avoid a violation of the Establishment Clause.⁸²⁵ Other circuits, however, see the spirit of *Cornelius* and *Perry* as inherently interwoven into *Hazelwood*'s standard, so much so that viewpoint neutrality is understood and does not require a mention.

⁸²¹ Susannah Barton Tobin, *Divining Hazelwood: The Need for A Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 228 (2004); Edward L. Carter, Kevin R. Kemper & Barbara L. Morgenstern, *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 161–62 (2006); Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 274–75 (1992).

⁸²² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁸²³ *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

⁸²⁴ *Hazelwood*, 484 U.S. at 266–67.

⁸²⁵ *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (viewing prevention of Establishment Clause violations as a potentially compelling justification for viewpoint discrimination).

A. Viewpoint Neutral Circuits

The Second, Sixth, Ninth, and Eleventh Circuits have held that school policies limiting student speech and expression must be viewpoint neutral.⁸²⁶

In *Peck ex rel. Peck v. Baldwinsville Central School District*, a kindergarten student created a poster as part of an assignment to demonstrate what he had learned over the year about ways to help the environment.⁸²⁷ Antonio, the student, included pictures of Jesus and several other religious symbols because of his belief that Jesus was the only way to save the planet.⁸²⁸ The school folded over the poster to conceal the religious content.⁸²⁹ On remand from the Second Circuit, the district court held that the school's censorship of the poster was based on legitimate pedagogical concerns, namely that Antonio could not articulate to the class the connection between images of Jesus and saving the environment.⁸³⁰ However before the fact question of viewpoint neutrality could even be decided by the district court on remand, the Second Circuit sought to extract from precedent the applicability of viewpoint neutrality to school policy.⁸³¹ The court aptly began its analysis by acknowledging the circuit dispute into which it was about to involve itself.⁸³² The court recognized the plausibility of arguments on either side, but ultimately folded the *Perry* and *Cornelius* nonpublic forum standards into its interpretation of the *Hazelwood* doctrine.⁸³³ *Hazelwood*, the court noted, never distinguished its facts with *Perry* or *Cornelius*, suggesting that the court did not intend to establish any kind of exception or new rule in its opinion.⁸³⁴ The court ultimately concluded its viewpoint analysis with, "we decline the District's

⁸²⁶ See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 356 (6th Cir. 2001), *reh'g granted and opinion vacated*, 197 F.3d 828 (6th Cir. 1999), *on reh'g en banc*, 236 F.3d 342 (6th Cir. 2001) (holding that state university's withholding of yearbooks on title grounds unauthorized because not viewpoint-neutral); *Planned Parenthood of Southern Nevada, Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991); *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989).

⁸²⁷ *Peck*, 426 F.3d at 621–22.

⁸²⁸ *Id.* at 621–22.

⁸²⁹ *Id.* at 622.

⁸³⁰ *Peck v. Baldwinsville Cent. Sch. Dist.*, No. 99-CV-1847, 2008 WL 4527598, at *23 (N.D.N.Y. Sep. 30, 2008).

⁸³¹ *Peck*, 426 F.3d at 632–33.

⁸³² *Id.* at 631–32.

⁸³³ *Id.* at 632–33.

⁸³⁴ *Id.* at 633.

invitation to depart, without clear direction from the Supreme Court, from what has, to date, remained a core facet of First Amendment protection.”⁸³⁵

In *Planned Parenthood of Southern Nevada v. Clark County School District*, a high school prevented Planned Parenthood from placing advertisements in a school-sponsored publication.⁸³⁶ Representatives for the school asserted that to allow the advertisements would present the impression that the high school had taken a stance on one side of the divisive issue of abortion.⁸³⁷ First, the court identified the publication as a nonpublic forum.⁸³⁸ With this analysis in hand, the court then matter-of-factly concluded that any school policy within the nonpublic forum context must be viewpoint neutral in light of *Cornelius*.⁸³⁹ Two paragraphs later, the court made its case for the legitimacy of the school’s policy by citing to *Hazelwood* while also including “see also *Cornelius*” in the in-line citation.⁸⁴⁰ In this paragraph, the justices attempted to connect the general viewpoint neutrality requirement from *Cornelius* to the specific school context of *Hazelwood*. By citing the cases together, the court implied that *Hazelwood* was merely an application of a larger principle from *Cornelius*, and there could be no real interpretation of the rule that might deviate (or at least provide an exception to) from the viewpoint neutrality requirement.⁸⁴¹

In *Kincaid*, the Sixth Circuit considered a case in which Kentucky State University confiscated and refused to distribute a version of the school’s yearbook.⁸⁴² The editor of the yearbook wanted to “bring Kentucky State into the nineties,” and included pictures of current world events, abstract phrases like “Destination Unknown,” and pictures without captions.⁸⁴³ The administration objected to the yearbook’s design and content as inappropriate and did not allow the yearbooks to be distributed on campus.⁸⁴⁴ The Court appropriately recognized the case’s obvious parallels to the facts of *Hazelwood*, but ultimately distinguished the case based on the level of involvement by the KSU administration in the yearbook’s

⁸³⁵ *Id.*

⁸³⁶ *Planned Parenthood*, 941 F.2d at 821.

⁸³⁷ *Id.* at 819.

⁸³⁸ *Id.* at 826–827.

⁸³⁹ *Id.* at 829.

⁸⁴⁰ *Id.*

⁸⁴¹ The Ninth Circuit later appears to marginalize its own holding from *Planned Parenthood in Downs*. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000). The *Downs* court points out that *Planned Parenthood* provides no real basis for a viewpoint neutrality requirement in *Hazelwood*. *Id.* at 1010.

⁸⁴² *Kincaid*, 191 F.3d at 722.

⁸⁴³ *Id.* at 723.

⁸⁴⁴ *Id.*

production.⁸⁴⁵ The court spent a considerable amount of time in its opinion analyzing the type of forum created by the yearbook.⁸⁴⁶ The interesting aspect of the court's forum analysis is that the court created its own unnecessary burden;⁸⁴⁷ early in the opinion, *Hazelwood* was described as requiring viewpoint neutrality in a nonpublic forum.⁸⁴⁸ Presumably because the actual language of *Hazelwood* gives no such requirement, the court also cited *International Society for Krishna Consciousness* as the basis for this assertion.⁸⁴⁹ However, *Krishna* occurred in an airport, entirely outside the scope or applicability of *Hazelwood*'s bounds.⁸⁵⁰

In *Searcey v. Harris*, the Atlanta School Board restricted the Atlanta Peace Alliance ("APA") from any involvement in Atlanta public high schools, including involvement in "career days."⁸⁵¹ The school board had adopted a policy stating in part, "participants shall not be allowed to criticize or denigrate the career opportunities provided by other participants."⁸⁵² The policy further stated that any group in violation of this policy would be "totally prohibited from participating in Career Day."⁸⁵³ In its analysis, the Eleventh Circuit applied logic similar to that of the Second Circuit in *Peck*.⁸⁵⁴ Having established the school, and in particular Career Day, as a nonpublic forum, the court placed the facts within the *Hazelwood* framework—which it conceived as adopting that classification. The Eleventh Circuit was not willing to interpret *Hazelwood*'s silence on viewpoint neutrality as indicating an absence of that standard.⁸⁵⁵ Instead, the court concluded, "there is no indication that the [Supreme] Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views."⁸⁵⁶

B. Circuits Authorizing Viewpoint Regulation

Not all courts, however, see viewpoint neutrality as an inherent implication of the *Hazelwood* standard. The First, Third, and Tenth Circuits

⁸⁴⁵ *Id.* at 727.

⁸⁴⁶ *Id.* at 727–28.

⁸⁴⁷ *Kincaid*, 191 F.3d at 728–29.

⁸⁴⁸ *Id.* at 727.

⁸⁴⁹ *Id.*

⁸⁵⁰ *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 674 (1992).

⁸⁵¹ *Searcey v. Harris*, 888 F.2d 1314, 1315 (11th Cir. 1989).

⁸⁵² *Id.* at 1317.

⁸⁵³ *Id.* at 1317–18.

⁸⁵⁴ *Id.* at 1319–20.

⁸⁵⁵ *Id.* at 1319.

⁸⁵⁶ *Id.* at 1319 n.7.

have held that while school policies must still be grounded in reasonability, student speech can be restricted on the basis of viewpoint.⁸⁵⁷ Avoiding a violation of the Establishment Clause, for instance, constitutes a compelling state interest that justifies a restriction of specific student speech.⁸⁵⁸

In *Ward v. Hickey*, a high school biology teacher facilitated a class discussion concerning abortion of fetuses with Down's Syndrome, specifically as it pertained to a Massachusetts referendum on the issue.⁸⁵⁹ Allegedly due to the content of the discussion, the school committee denied the teacher tenure.⁸⁶⁰ The First Circuit addressed several questions on appeal; of particular concern for purposes of this note was the issue of whether Ward's particular discussion of abortion was protected by the First Amendment or instead subject to regulation under the authority of *Hazelwood*.⁸⁶¹ The court focused its viewpoint analysis around *Perry* and acknowledged the Supreme Court's holding that government policies must not seek to suppress expression due to the viewpoint expressed.⁸⁶² However, the court interestingly concluded that, in light of the *Hazelwood* standard,⁸⁶³ *Perry* is distinguishable from the facts of *Ward*, and its holding did not apply.⁸⁶⁴ The court believed that the greatest difference between these two cases was the presence in *Ward* of a captive audience of impressionable young students (unlike the faculty mail system in *Perry*).⁸⁶⁵

The First Circuit's distinction of *Ward* and *Perry* as they relate to *Hazelwood* is significant, particularly when the court concluded that *Hazelwood* did not require viewpoint neutrality in school policies.⁸⁶⁶ In doing so, the court suggested that the stakes are higher when young impressionable minds are in question. The court interpreted *Hazelwood* as

⁸⁵⁷ See *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172–73 (3d Cir. 1999) *reh'g en banc granted, opinion vacated sub nom C.H. v. Oliva*, 197 F.3d 63 (3d Cir. 1999), and *on reh'g en banc*, 226 F.3d 198 (3d Cir. 2000); *Fleming v. Jefferson Cnty. School Dist.*, 298 F.3d 918, 926 (10th Cir. 2002).

⁸⁵⁸ See *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (“In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the university must therefore satisfy the standard of review appropriate to content-based exclusions. *It must show that its regulation is necessary to serve a compelling state interest.*”); accord *Carey v. Brown*, 447 U.S. 455, 465 (1980).

⁸⁵⁹ *Ward*, 996 F.2d at 450.

⁸⁶⁰ *Id.*

⁸⁶¹ *Id.* at 452–54.

⁸⁶² *Id.* at 454.

⁸⁶³ *Id.*

⁸⁶⁴ *Id.*

⁸⁶⁵ *Ward*, 996 F.2d at 454.

⁸⁶⁶ *Id.* (citing *Hazelwood*, 484 U.S. at 270).

authorizing viewpoint regulation in the interest of preserving the student learning experience, a “legitimate pedagogical concern.”⁸⁶⁷

In *Morgan v. Swanson*, a public elementary school prohibited a student from distributing laminated bookmarks containing a story titled “The Legend of the Candy Cane,”⁸⁶⁸ citing the Plano Independent School District’s policy prohibiting the distribution of “any written material, tapes, or other media over which the school does not exercise control and that is intended for distribution to students” without approval from the school.⁸⁶⁹

One of the more significant arguments raised on appeal by the plaintiff was that the school’s policy was facially unconstitutional because of an absolute rule against viewpoint discrimination.⁸⁷⁰ The Fifth Circuit said, succinctly, “this is not so.”⁸⁷¹ The court noted that the case at issue arose within a public school, an environment the court labeled “a special First Amendment Context.”⁸⁷² The court acknowledged the plaintiff’s citation of a variety of cases suggesting a mandate of viewpoint neutrality, but it then summarily rejected the applicability of the cases, as not one of them involved student speech within a public school.⁸⁷³ Though Judge Benavides identified the contested issue of viewpoint neutrality within the context of an attempt to decide a qualified immunity claim,⁸⁷⁴ it is still worth noting that the Fifth Circuit did not consider viewpoint neutrality an absolute standard in the school context. In this way, *Morgan* suggests a willingness by the Fifth Circuit to isolate the public school classroom from the general mandates in *Perry* and *Cornelius*, implying that the school environment is unique, and it would be inappropriate to apply to it a viewpoint neutrality requirement.

In *C.H. ex rel. Z.H. v. Oliva*, the Third Circuit considered a case in which a kindergarten student created a poster for a Thanksgiving-themed project expressing thankfulness for Jesus, and the school censored the poster.⁸⁷⁵ The same student was also prohibited a year later (as a first grader) from

⁸⁶⁷ *Id.* at 452 (quoting *Hazelwood*, 484 U.S. at 273).

⁸⁶⁸ *Morgan v. Swanson*, 659 F.3d 359, 366 (5th Cir. 2011).

⁸⁶⁹ *Id.* at 366–67.

⁸⁷⁰ *Id.* at 379.

⁸⁷¹ *Id.*

⁸⁷² *Id.*

⁸⁷³ *Morgan*, 659 F.3d at 379.

⁸⁷⁴ *Id.* at 383.

⁸⁷⁵ *C.H. ex rel. Z.H.*, 195 F.3d at 168–69.

bringing a biblical-themed book to share with the class.⁸⁷⁶ In determining the validity of the school's actions against the student, the court appropriately identified *Hazelwood* as the controlling case.⁸⁷⁷ The court ultimately held that instances can and do arise in which a school must be able to take non-viewpoint-neutral action against certain speech, recognizing *Hazelwood*'s requirements of both legitimate pedagogical concern and the appearance of the school's imprimatur in that context.⁸⁷⁸ The court acknowledged that while viewpoint neutrality remains crucial to the analysis of speech restrictions in the context of cases like *Rosenberger* and *Lamb's Chapel*, which related to extracurricular speech restrictions, it "is simply not applicable to restrictions on the State's own speech In [teacher-supervised, school-sponsored activity], viewpoint neutrality is neither necessary nor appropriate."⁸⁷⁹ The government must have the ability to control the messages that are reasonably assigned to it, and consequently should not be artificially shackled by an arbitrary requirement of viewpoint neutrality.

V. THE CASE AGAINST VIEWPOINT NEUTRALITY

Hazelwood provides an exception to the general requirement of viewpoint neutrality found in *Perry* and *Cornelius*. The case against requiring viewpoint neutrality in school speech policy operates on two levels. First, the *Hazelwood* standard applies to a far narrower and more specific context than some federal courts choose to recognize. Schools must be given the authority they need, though not more than they need, to regulate the kinds of student speech that attach to the name and symbolic voice of the school. Second, a requirement of viewpoint neutral speech regulation can impel school officials to restrict wide categories of speech in order to regulate the single expression of speech bearing the school's imprimatur. Simply, a requirement of administrative viewpoint neutrality substantially limits students' civil liberties by applying a kind of atomic bomb to the free speech landscape when a precision targeting device is better suited.

⁸⁷⁶ *Id.* at 169.

⁸⁷⁷ *Id.* at 171.

⁸⁷⁸ *Id.* at 171–72.

⁸⁷⁹ *Id.* at 173.

A. Reigning in *Hazelwood*

A great deal of the debate over viewpoint neutrality in *Hazelwood* arises not from the language of the opinion itself, but rather from an unnecessary insistence by some federal courts to insert its rule into contexts in which it does not apply.⁸⁸⁰ The school imprimatur standard within *Hazelwood* acts as a kind of jurisdictional trigger, confining the Court's holding to that narrow context. When lower courts ignore the narrow circumstances in which *Hazelwood* applies, they lose sight of the justification for *Hazelwood*'s viewpoint-regulation allowance. This leads to courts' expanding the reach of *Hazelwood* beyond the circumstances justifying its rule; it is hardly surprising that these courts then read an otherwise-alien viewpoint neutrality requirement into the case.

1. *Morse v. Frederick*'s Affirmation of *Hazelwood*'s Scope

In 2007, the Supreme Court considered a school's authority to restrict student speech advocating illegal drug use in *Morse v. Frederick*.⁸⁸¹ The Court held that schools have the authority to limit student speech that promotes drug use.⁸⁸² The majority acknowledged its holding from *Hazelwood*, the last case it had considered regarding student speech, but ultimately held that it did not apply to the present facts.⁸⁸³ The Court reasoned that Frederick's banner displaying the phrase "Bong Hits 4 Jesus" simply would not be reasonably interpreted by a viewer as official school speech; the banner did not trigger *Hazelwood*'s fact-specific imprimatur rule.⁸⁸⁴

Justice Alito, joined by Justice Kennedy, cautioned in concurrence that the Court's holding should stand as a narrow exception to *Tinker*, not as conceptual fodder for a new rule category.⁸⁸⁵ Justice Alito agreed that a public school regulation restricting student promotion of illicit drug use

⁸⁸⁰ Waldman, *supra* note 8, at 64 ("[W]hen evaluating whether *Hazelwood* permits viewpoint discrimination, courts have been influenced, perhaps without realizing it, by the context in which they are applying it. As such, the extension of *Hazelwood* to contexts beyond school-sponsored student speech has directly contributed to the confusion and conflict over whether *Hazelwood* should be interpreted as permitting viewpoint discrimination.").

⁸⁸¹ *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

⁸⁸² *Id.* at 424 (Alito, J., concurring).

⁸⁸³ *Id.* at 405 ("[*Hazelwood*] does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur.").

⁸⁸⁴ *Id.*

⁸⁸⁵ *Id.* at 425 (Alito, J., concurring).

does not conflict with the Constitution, but also identified “such regulation as standing at the far reaches of what the First Amendment permits.”⁸⁸⁶ Alito suggested that *Bethel v. Fraser*,⁸⁸⁷ *Hazelwood*, and now *Morse* all function as a set of exceptions to *Tinker* that only take effect under a highly specific set of circumstances.⁸⁸⁸

Adding clarity to a point raised by the majority, Justice Alito emphasized a critical but often ignored aspect of *Hazelwood*: the “pedagogical concern” standard’s sole application to speech that may reasonably be perceived as coming from the mouth of the school itself. “[*Hazelwood*] allows a school to regulate what is in essence the school’s own speech,” Justice Alito wrote; “that is, articles that appear in a publication that is an official school organ.”⁸⁸⁹

Morse is significant in the way that it emphasizes *Hazelwood*’s limited applicability and scope. If *Hazelwood* were to apply as broadly as some federal courts suggest, the Court in *Morse* presumably would have applied *Hazelwood* to the facts rather than carve out a new public policy exception for drug-related speech. The Court recognized in its opinion that *Hazelwood* is only triggered in highly specific circumstances, circumstances that the Court felt were not at issue in *Morse*.

2. The School Imprimatur Trigger

The Court in *Hazelwood* held that the question of school-sponsored speech arose only within the context of “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”⁸⁹⁰ Student homework, art projects, and show-and-tell are excluded from *Hazelwood*’s application because they are forms of private expression not entailing government imprimatur. As then-Circuit Judge Alito noted in *Child Evangelism Fellowship v. Stafford*, *Hazelwood* applies only to government-sponsored speech; in other words, speech from

⁸⁸⁶ *Id.* (Alito, J., concurring).

⁸⁸⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (allowing sanctions against a student for offensively lewd and indecent speech despite a First Amendment challenge).

⁸⁸⁸ *Morse*, 551 U.S. at 422 (Alito, J., concurring) (“But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court.”).

⁸⁸⁹ *Id.* at 423 (Alito, J., concurring).

⁸⁹⁰ *Hazelwood*, 484 U.S. at 271.

“a public school or other government entity [that] aims to convey its own message.”⁸⁹¹

Unfortunately, many federal courts have overextended *Hazelwood*, applying it to virtually any speech occurring in a school context in such a way that public school boards have almost unlimited regulatory authority over speech in that environment.⁸⁹² Courts have reconfigured *Hazelwood* from a limited exception into a general rule.

Yet *Hazelwood* presents itself merely as a device to protect schools from having their names attached to speech reasonably perceived as presenting their own points of view. The Supreme Court in *Hazelwood* repeatedly offered the examples of school theater and school newspapers as communication scenarios in which the public would reasonably perceive school imprimatur.⁸⁹³ By contrast, student assignments confined to classrooms and student-teacher relationships involve expressions of exclusively private student voice, and thus operate outside of *Hazelwood*’s bounds. Classroom assignments and projects necessarily solicit personal viewpoints and expression from students; consequently, it is not reasonable to expect those activities to be understood as the official voice of the school.

In specific situations of reasonably perceived government imprimatur, *Hazelwood* gives schools the ability to pinpoint specific speech that departs from their pedagogical objectives. Schools do not need to restrict broad categories of speech or limit student expression altogether; rather, they need to restrict and limit specific student communication within those contexts, to avoid a perception that the school is advancing a point of view it does not want associated with its educational voice.

B. Viewpoint in School Curriculum and Messaging

The absence of a viewpoint neutrality mandate in *Hazelwood* is also sensible given the inseparability of viewpoints and pedagogical messaging in the school environment. In *Abington v. Schempp*, the Supreme Court noted that “public schools serve a uniquely public function: the training of

⁸⁹¹ Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 524 (3rd Cir. 2004) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)) (internal quotations omitted).

⁸⁹² See Waldman, *supra* note 8, at 64.

⁸⁹³ *Hazelwood*, 484 U.S. at 271–72.

American citizens...”⁸⁹⁴ *Abington* and other cases emphasize the point that American public schools exist as a device by which students are prepared to enter the larger society as citizens of the sort the government prefers.⁸⁹⁵ While it can certainly be debated what objectives should be incorporated into “the training of American citizens,” the fact remains that such training requires the advocacy of particular viewpoints and the disapproval of others:⁸⁹⁶

Postmodernism has helped us to an appreciation that even the “information” conveyed in school curricula is never “hard facts and figures” but screened data presented from a cultural perspective. Accordingly, when a society educates its youth, it cannot escape making judgments about the kind of citizens it wants its children to become. Education is inevitably about ultimate truths or perceptions thereof [.]⁸⁹⁷

To insert viewpoint neutrality into the *Hazelwood* rule (directed as it is to essentially government speech) is both to mistake the nature of the educational enterprise and to drastically affect the ability of schools to control their educational function.⁸⁹⁸ Viewpoint neutrality makes it impossible for a public school to effectively accomplish its pedagogical mission.⁸⁹⁹ Simply, viewpoint regulation of government speech allows schools to do what they were established to do.

⁸⁹⁴ Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 241–42 (1963) (Brennan, J., concurring).

⁸⁹⁵ See *Bethel Sch. Dist.*, 478 U.S. at 681; Bd. of Educ. v. Pico, 457 U.S. 853, 876 (1982) (“It . . . seems entirely appropriate that the State use ‘public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system.’”).

⁸⁹⁶ Martin H. Redish & Kevin Finnerty, *What Did You Learn In School Today? Free Speech, Values Incultation, and the Democratic Educational Paradox*, 88 CORNELL L. REV. 62, 84 (2002) (“Both the selection of topics to be taught and decisions about what is to be taught concerning each topic inherently imply certain choices as to social, moral, or political values Regardless of which side of this debate one ultimately favors, the implications for present purposes should be clear: it is unrealistic to believe that seemingly value-neutral curricular choices are completely free from significant, if often unstated, substantive value judgments.”).

⁸⁹⁷ Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 94 (1998).

⁸⁹⁸ Helen Norton, *Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1334 (2004) (“[I]n situations where the government is the ‘literal speaker’ – i.e., the entity that is actually saying, writing, or otherwise directly delivering the message – it should be permitted to decline to serve as the ‘dummy’ through which a private ventriloquist projects her views.”); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 187–88 (2007) (“[A] public school’s refusal to sponsor speech it deems incompatible with the shared values of a civilized social order will typically be mediated by someone’s possible acceptance or rejection of the viewpoint of the speech in question, and will therefore be viewpoint-based regulation, reflecting approval of or hostility toward one or more points of view.”).

⁸⁹⁹ R. George Wright, *Tinker and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105, 117 (2008) (“A school should not be legally handicapped for fairly taking its democratically

C. *Hazelwood*'s Implication of the Policy Behind the Government Speech Rule

The Supreme Court has acknowledged the State's interest and authority to promote its own favored viewpoints.⁹⁰⁰ In *Pleasant Grove City v. Summum*, the Court recited the relevant law as follows:

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Ass'n*, 544 U. S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 139, n. 7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression”). A government entity has the right to “speak for itself.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000). “[I]t is entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995), and to select the views that it wants to express. See *Rust v. Sullivan*, 500 U. S. 173, 194 (1991); *National Endowment for Arts v. Finley*, 524 U. S. 569, 598 (1998) (SCALIA, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view”).⁹⁰¹

In *Rosenberger v. Rector and Visitors of University of Virginia*, the University of Virginia refused to direct funds generated from student fees toward paying a printing bill for a Christian student newspaper.⁹⁰² The Supreme Court reversed the decision from the Fourth Circuit and held that withholding the funds was viewpoint discrimination, which inappropriately infringed on the Free Speech Clause and undermined the neutrality toward religion the Establishment Clause contemplated.⁹⁰³ Critically, the Court explained that the allocation of student fees did not blur the line “between the University’s own favored message and the private speech of students.”⁹⁰⁴ The Court thus distinguished the rule that the government may

assigned and democratically supervised vital mission seriously on school grounds and during school hours”).

⁹⁰⁰ See e.g., *Gonzalez v. Carhart*, 550 U.S. 124, 157 (2007) (“[T]he government may use *its voice* and its regulatory authority to *show its profound respect for the life within the woman*.”) (emphasis added); Blake R. Bertagna, *The Government’s Ten Commandments: Pleasant Grove City v. Summum and the Government Speech Doctrine*, 58 DRAKE L. REV. 1, 8 (2009) (“[T]he Court observed that ‘when the State is the speaker, it may make content-based choices.’”) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833(1995)).

⁹⁰¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

⁹⁰² *Rosenberger*, 515 U.S. at 822–23.

⁹⁰³ *Id.* at 845–46.

⁹⁰⁴ *Id.* at 834; see also *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006) (“We

discriminate based on viewpoint when the speech is the government's own—a proposition for which, notably, the Court cited *Hazelwood*.⁹⁰⁵

In citing *Hazelwood* for that legal standard, the Court signaled that it viewed that case as implicating the policy behind the government speech doctrine. The affinity between *Hazelwood* and the government speech cases is clear enough. Additionally, since the educational context is a pristine instance of government interest in communicative autonomy, a public school's regulation on viewpoint grounds of messages reasonably perceived as bearing its imprimatur is in keeping with the Supreme Court's recognition of government speech prerogatives.⁹⁰⁶

Five years after the Court's decision in *Rosenberger*, the Ninth Circuit reemphasized the distinction between government speech and individual student expression in *Downs v. Los Angeles Unified School District*.⁹⁰⁷ In *Downs*, a teacher brought action under 42 U.S.C. § 1983 against his school district to allow him to post material on a school bulletin board that contrasted with materials placed on the board as part of the district's Gay and Lesbian Awareness Month.⁹⁰⁸ The Ninth Circuit rejected *Downs*'s assertion that *Hazelwood* controlled his case.⁹⁰⁹ The court reluctantly conceded that it was bound under *stare decisis* to interpret *Hazelwood* according to the viewpoint neutrality lens of the court's *en banc* holding in *Planned Parenthood v. Clark County School District*.⁹¹⁰ However, the court concluded that, notwithstanding *Planned Parenthood*'s misguided "viewpoint neutrality microscope," the school's actions in the present case

have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because [it is] legally required to do so.").

⁹⁰⁵ *Rosenberger*, 515 U.S. at 834; see also Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.").

⁹⁰⁶ See *Pleasant Grove City*, 555 U.S. at 464 (holding that placing a permanent monument in a public park constituted an exercise of government speech not subject to Free Speech Clause scrutiny); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, the government has to say something..."). The standards guiding a finding of government speech depart in certain respects from those employed in the *Hazelwood* analysis — due, no doubt, to the unique educational environment at issue in the latter — but the policy justifications are identical.

⁹⁰⁷ *Downs*, 228 F.3d at 1009.

⁹⁰⁸ *Id.* at 1005.

⁹⁰⁹ *Id.* at 1011.

⁹¹⁰ *Id.* Though *stare decisis* forced the *Downs* court to view *Hazelwood* through the flawed interpretation of *Planned Parenthood*, the court's reasoning in *Downs* remained sound. The court correctly concluded that the bulletin board was clear government speech, and the school should consequently not be forced to burden speech bearing its imprimatur with a viewpoint neutrality requirement. *Id.* *Downs* remains an important case in illustrating the legal distinctions and impact of government and student speech.

did not implicate the court's own (albeit flawed) prior interpretation of the *Hazelwood* rule.⁹¹¹ The court noted that the only parties with control over the bulletin board's content were school faculty and staff, and the bulletin board was not open to the public or the student body as a kind of open forum for wide discussion of political views.⁹¹² The Ninth Circuit cited *Rosenberger* directly in its justification for granting the school district control over the bulletin board's content.⁹¹³ The court properly recognized that in situations when the government unequivocally offers its own viewpoint and value system in the public setting, the state must be allowed to protect its voice by restricting content that might be perceived as an extension of the state.⁹¹⁴ A viewpoint neutrality mandate simply does not fit properly into such an analytical context.

In a similar fashion, the Fifth Circuit considered in *Chiras v. Miller* whether a high school student could bring action against the Texas State Board of Education for refusal to approve a specific science textbook for state funding.⁹¹⁵ The court held that when the speech in question is unambiguously the government's own, the state's authority to control and protect its message operates independently from any viewpoint neutrality mandate.⁹¹⁶ Viewpoint neutrality is simply a different requirement for an entirely different kind of speech.⁹¹⁷

⁹¹¹ *Id.*

⁹¹² *Downs*, 228 F.3d at 1012 ("We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth: LAUSD, by issuing Memorandum No. 111, and Leichman High, by setting up the Gay and Lesbian Awareness bulletin boards. The bulletin boards served as an expressive vehicle for the school board's policy of 'Educating for Diversity.'"); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 617 (2008) ("Concluding that the bulletin board's contents continued to reflect the district's own expression even when it invited individuals to join and contribute to it, the court held that the district could not be compelled to allow others to distort its position.").

⁹¹³ *Downs*, 228 F.3d at 1013 ("When the government is formulating and conveying its message, 'it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted' by its individual messengers.") (quoting *Rosenberger*, 515 U.S. at 833).

⁹¹⁴ *Id.*; see also *Burch v. Barker*, 861 F.2d 1149, 1158 (9th Cir. 1988) ("[*Hazelwood*] described the distinction it was drawing between speech protected by standards of *Tinker* and speech which the educators could regulate as the distinction 'between speech that is sponsored by the school and speech that is not.'") (internal citations omitted).

⁹¹⁵ *Chiras v. Miller*, 432 F.3d 606, 607 (5th Cir. 2005).

⁹¹⁶ *Id.* at 612 (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

⁹¹⁷ Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 827 (2009) ("There is a critical distinction between the government as speaker in setting the curriculum and the government as regulator in punishing student speech.").

D. The Effect of Over-Expanding *Hazelwood*'s Scope

The confusion over the role of *Hazelwood* in public schools gives rise to opinions like *Bannon v. Palm Beach*, a case in which the Eleventh Circuit considered whether a school could compel a student to remove Christian words and symbols from a mural painted as part of a school beautification project.⁹¹⁸ The court ultimately held that the panels constituted school-sponsored expression and that school had the authority to remove religious content from the panels.⁹¹⁹ The problem with *Bannon* does not lie with the court's conclusion; a strong case can be made (and indeed was made) that a painted panel displayed indefinitely in a school would reasonably bear the school's imprimatur. However, the court arrived at its holding by unnecessarily analyzing whether the school's policy was viewpoint-neutral.⁹²⁰ The court acknowledged earlier in the opinion that government expression, even if delivered through the speech of an individual, may be regulated due to its subject matter; no mention is ever made of a viewpoint neutrality requirement.⁹²¹ However, the court relied on its prior ruling in *Searcey* to extrapolate that *Hazelwood* requires viewpoint-neutrality in the regulation of student speech.⁹²² Though the *Bannon* Court may have arrived at the correct decision, its logic represents a dangerous pattern. *Hazelwood*'s actual language and intent is ignored, leaving courts to apply their own language in any number of incorrect contexts.

In *Fleming v. Jefferson County*, the Tenth Circuit considered the constitutionality of Columbine High School's policy against religious references on student-designed painted tiles displayed in the school hallways.⁹²³ The court upheld Columbine's policy, citing concerns over religious debates and painful reminders of the school shooting as reasonable pedagogical concerns.⁹²⁴

In the penultimate paragraph of *Fleming*, the court shored up its argument against a viewpoint neutrality standard with dicta describing the absurd conclusions that can result from a legal standard requiring a school to employ only viewpoint-neutral speech regulation.⁹²⁵ The court considered

⁹¹⁸ *Bannon v. Sch. Dist. of Palm Beach Cnty*, 387 F.3d 1208, 1210 (11th Cir. 2004).

⁹¹⁹ *Id.* at 1217.

⁹²⁰ *Id.* at 1215.

⁹²¹ *Id.* at 1213.

⁹²² *Id.* at 1215 n.4; *see Searcey*, 888 F.2d at 1325.

⁹²³ *Fleming*, 298 F.3d at 921–23.

⁹²⁴ *Id.* at 934.

⁹²⁵ *Id.*

the burden on schools of having to select between the unattractive options of allowing highly offensive speech, or disallowing patently innocuous or favored speech, all in the name of viewpoint neutrality.⁹²⁶ The court drove the point home by concluding that, “when posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it.”⁹²⁷

Some scholars have suggested that the Rehnquist court passed up a golden opportunity to settle this dispute when it denied certiorari to *Fleming* in 2003.⁹²⁸ The facts of the case appeared to set an ideal stage for a firm decision from the court clarifying the gray areas of *Hazelwood*. The permanent presence of the tiles in school hallways, the tension between creative deference and faculty oversight in the project, and the shroud of emotionality surrounding the dispute in the wake of the Columbine tragedy all seemed to point to the Court confronting the issue head on. However, the Court may well have passed over an opportunity, and its denial of certiorari leaves unanswered *Fleming*’s provocative argument in favor of focused regulatory targeting of specific viewpoints to protect and facilitate the pedagogical interests of the school whose voice is implicated in the subject speech.

Fleming nonetheless confronted an important reality in school policy. When schools are required to adopt policies that must turn a blind eye to viewpoint, the schools must swing to either extreme on the spectrum of expressive tolerance. The administration must choose between allowing a wide range of student speech — including speech that misrepresents the school’s own voice and interests — and maintaining its pedagogical function through a kind of Draconian comprehensive ban on all speech on the subject in dispute. The dicta from *Fleming* focus specifically on the latter scenario, but both eventualities are equally plausible and equally unacceptable in a classroom context. In *Fleming*, the Tenth Circuit recognized that the right of students to express themselves within a First Amendment framework is an essential component of the American

⁹²⁶ *Id.*

⁹²⁷ *Id.*

⁹²⁸ Tobin, *supra* note 29, at 256 (“[T]he Court missed an opportunity to clarify the *Hazelwood* test regarding viewpoint neutrality and let stand a holding that suppresses the free speech not only of students, but also of parents and the local community.”); see also Filipp Kofman, *Fleming v. Jefferson County: A Need for Viewpoint Neutrality*, 22 GEO. MASON U. CIV. RTS. L.J. 151, 176 (2012); Katie Hammett, Comment, *School Shootings, Ceramic Tiles, and Hazelwood: The Continuing Lessons of the Columbine Tragedy*, 55 ALA. L. REV. 393, 407 (2003).

Constitutional experience.⁹²⁹ Yet the court also recognized that a viewpoint neutrality rule manifests its ill fit in the *Hazelwood* context through inducing awkward and unnecessary overregulation of student speech.⁹³⁰

Viewpoint-based regulation provides schools with the tools necessary to maintain control over their own voices and reputation without having to “swing the pendulum” to one end or the other — in other words, either having to leave their apparent imprimatur unregulated, or being forced to protect their interest by eliminating participation in entire categories of speech. Viewpoint-based regulation acts as a kind of precise surgical tool, identifying specific problems without having to forbid student discourse that does not interfere with the school’s educational objectives.

E. A Note on Reasonableness

Critics of this approach to viewpoint-specific restrictions in public schools may well approach a school’s capacity for responsible policy with a certain degree of libertarian cynicism. Government cannot be trusted to implement viewpoint discriminatory policies in a truly responsible and constitutional manner, they might argue, so it is ultimately better to give schools a simple rubric by way of viewpoint neutrality.⁹³¹ This concern is not unfounded; after all, many public schools have routinely abused their power by arbitrarily restricting student viewpoints that do not implicate the imprimatur concerns that give rise to *Hazelwood*’s rule.⁹³²

In light of these concerns, it is important to emphasize that the viewpoint-specific speech restrictions authorized in *Hazelwood* must be bounded not only by the “school-imprimatur” circumstance, but also by *pedagogical reasonableness* in order to be constitutionally authorized.⁹³³

At any rate, the discussion, whether one supports neutrality or viewpoint-specific restrictions, must operate within the bounds of the assumption that courts may regulate school policy within the rational context of *Cornelius* and the curricular bounds set forth in *Hazelwood*.⁹³⁴

⁹²⁹ *Fleming*, 298 F.3d at 934.

⁹³⁰ *Id.*

⁹³¹ See Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 751–66 (2011).

⁹³² Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 316 (1992).

⁹³³ R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. U.L.J. 175, 204 (2007) (“A school’s regulation of such speech . . . must always at a minimum promote a legitimate purpose of a public educational system in a reasonably tailored way.”).

⁹³⁴ See *Cornelius*, 473 U.S. at 811; *Fleming*, 298 F.3d at 934 (“A number of constitutional restraints

VI. CONCLUSION

Courts have vigorously debated the limits of school authority over student speech, specifically a school's ability to regulate speech on the basis of viewpoint under the terms of *Hazelwood*. Taken at face value, it is easy to dismiss policies of viewpoint regulation as unduly censorial and instead embrace viewpoint neutrality as the answer to protecting student expression within the schoolhouse gate.⁹³⁵

However, a nuanced and disciplined examination of *Hazelwood* reveals that courts and scholars may be having the wrong argument.⁹³⁶ The Court intended its holding in *Hazelwood* to apply only to a specific set of circumstances: namely, theatrical productions, publications, and other publically accessible activities that could reasonably bear the school's imprimatur. In other words, the Court intended schools to have complete control over speech that appears to be the official voice and opinion of the school and ultimately the government. Viewing *Hazelwood* in this light, it becomes apparent that schools must be given the authority to regulate this kind of speech, and it is appropriate — indeed intuitive — that such regulation be viewpoint-specific. Were schools given any less authority, the government's voice would no longer be its own and would instead find itself under the control of a polarizing noise of individual opinions and contradictory viewpoints. Viewpoint neutrality simply has no place within an accurate reading of *Hazelwood*.

Hazelwood, and the viewpoint regulation it allows, protects schools by granting them the authority they need, no more and no less, to maintain a singular institutional voice and to preserve the learning environment for which they exist to foster in the first place.

continue to operate on public schools' actions, such as the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and substantive due process.").

⁹³⁵ See Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1566 (2003).

⁹³⁶ Waldman, *supra* note 8, at 123 ("The confusion and dissension over whether *Hazelwood* permits viewpoint-based restrictions has been an unfortunate byproduct of its overextension.").

NO CHILD LEFT BEHIND AND SPECIAL EDUCATION: THE NEED FOR CHANGE IN LEGISLATION THAT IS STILL LEAVING SOME STUDENTS BEHIND

Stephanie S. Fitzgerald

I. INTRODUCTION

When speaking out in favor of education reform, President Bush asserted that “too many of [the nation’s] neediest children [were] being left behind.”⁹³⁷ President Bush and Congress believed the passage of the No Child Left Behind Act of 2001 (“NCLB”) would improve educational opportunities and impact every student in schools across America.⁹³⁸ The provisions of NCLB, at the core, seek to “drive broad gains in student achievement and to hold states and schools more accountable for student progress.”⁹³⁹ Despite the intentions of President Bush and members of Congress, some of the nation’s neediest children are still being left behind.⁹⁴⁰

Since NCLB’s passage, the law has remained at the center of education debates and NCLB has been described as the “symbol of all things good and bad in education.”⁹⁴¹ In particular, the changes brought by NCLB to special education have been dramatic and unrealistic; the changes fail to recognize the wide-range of disabilities affecting over six million children in America.⁹⁴² In four parts, this article focuses on NCLB’s negative impact on special education. Part II outlines the provisions of NCLB and examines the differences between NCLB and the Individuals with Disabilities Education Act (“IDEA”).⁹⁴³ Part III provides a detailed explanation of the existing scholarly opinions in support of, and in disagreement with, NCLB. Part IV discusses the current political landscape and NCLB’s pending reauthorization. Finally, Part V, based on an analysis of the issues plaguing

⁹³⁷ U.S. DEPT. OF EDUC., EXECUTIVE SUMMARY: THE NO CHILD LEFT BEHIND ACT OF 2001 1, 1 (Jan. 2002), available at <http://www2.ed.gov/nclb/overview/intro/execsumm.pdf>.

⁹³⁸ *No Child Left Behind*, EDUC. WEEK, August 4, 2004, <http://www.edweek.org/ew/issues/no-child-left-behind/>.

⁹³⁹ *Id.*

⁹⁴⁰ *Id.*

⁹⁴¹ Ann McColl, *Tough Call: Is No Child Left Behind Constitutional?* 86 PHI DELTA KAPPAN 604, 604 (2005).

⁹⁴² Nancy D. Reder, *Accountability for Students with Disabilities*, National Association of Special Education, at 1 (May 2007), http://www.nasdse.org/Portals/0/Documents/1_ACCOUNTABILITY%20FOR%20STUDENTS%20WITH%20DISABILITIES.pdf.

⁹⁴³ Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2006).

the current system, suggests a solution to improve the existing relationship between special education and NCLB. Furthermore, Part V addresses the positive aspects and possible shortcomings of implementing the suggested changes prior to the conclusion of the article in Part VI.

II. STATEMENT OF THE LAW

Understanding NCLB's framework is key to understanding NCLB's flaws as the Act relates to special education. Part II discusses NCLB's passage and the requirements NCLB sets for schools and districts. This section concludes with the similarities and differences of NCLB in comparison to the IDEA, another significant educational policy that relates to the education of students with disabilities.

A. NCLB's Passage

In an effort to decrease the achievement gap and hold states and districts accountable for the education of every American student, Congress reauthorized the Elementary and Secondary Education Act ("ESEA") through the passage of NCLB in 2001.⁹⁴⁴ When President Bush signed NCLB into law, NCLB authorized some of the most widespread changes to the American school system since the ESEA's passage in 1965.⁹⁴⁵ NCLB aims "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."⁹⁴⁶ These requirements focus on improving the quality and effectiveness of the education system and raising achievement levels of all students.⁹⁴⁷ Legislators contend successful implementation centers around four main pillars of accountability, flexibility in the use of funding, research-proven effectiveness in instructional methods and

⁹⁴⁴ Richard Apling & Nancy Lee Jones, CONG. RESEARCH SERV., RL32913, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): INTERACTIONS WITH SELECTED PROVISIONS OF THE NO CHILD LEFT BEHIND ACT (NCLBA) 2 (2005), *available at* <http://www.asha.org/uploadedFiles/advocacy/-federal/idea/CRSReportIDEAandNCLBA.pdf>.

⁹⁴⁵ Candace Cortiella, *NCLB and IDEA: What Parents and Students with Disabilities Need to Know and Do*, NAT'L CENTER ON EDUC. OUTCOMES, (Aug. 2006), at 6, <http://www.cehd.umn.edu/nceo/onlinepubs/parents.pdf>.

⁹⁴⁶ No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006).

⁹⁴⁷ Cortiella, *supra* note 9, at 6.

materials in the classroom, and influence, information, and choice for parents.⁹⁴⁸

B. NCLB Requirements

NCLB's two primary objectives aim to ensure all students are held to the same academic expectations and that the states and districts use assessments to ensure schools, teachers, and administrators are held accountable for students' failures to meet proficiency goals.⁹⁴⁹ NCLB uses testing and accountability requirements to assist with the aim of raising and closing the achievement gaps, "based on a goal of '100 percent proficiency' by 2014."⁹⁵⁰ To reach this goal, NCLB requires schools to test students in grades three through eight annually in reading and mathematics, and to test students in science at least one time each in elementary, middle, and high school.⁹⁵¹

In addition to the testing, NCLB requires states to develop academic proficiency goals for all students.⁹⁵² These goals require testing to determine whether all students are meeting the established proficiency goals.⁹⁵³ The proficiency standards are also used to determine the level of academic achievement, or adequate yearly progress ("AYP"), students must attain, as measured by the state assessments.⁹⁵⁴ The definition of AYP must specifically address how districts and schools plan to assess student ability and monitor student progress from year to year.⁹⁵⁵ While the provisions of NCLB permit each state to develop a definition for AYP as long as the definition aligns with certain specifications outlined by the federal government.⁹⁵⁶

These tests and the proficiency standards are important because schools must meet the proficiency goals as a whole to make AYP, and specific

⁹⁴⁸ U.S. DEPT. OF EDUC., *supra* note 1, at 1.

⁹⁴⁹ 20 U.S.C. § 6301.

⁹⁵⁰ Linda Darling-Hammond, *Evaluating 'No Child Left Behind'*, THE NATION (May 2, 2007), <http://www.thenation.com/article/evaluating-no-child-left-behind>.

⁹⁵¹ *No Child Left Behind*, EDUC. WEEK, (last updated Sept. 19, 2011), available at <http://www.edweek.org/ew/issues/no-child-left-behind/>.

⁹⁵² 20 U.S.C. § 6311(b)(1)(A).

⁹⁵³ *Id.* § 6311(b)(3)(A).

⁹⁵⁴ *Id.* § 6311(b)(2)(B).

⁹⁵⁵ *Id.* § 6311(b)(2)(C)(iv)-(v).

⁹⁵⁶ *Id.* § 6311(b)(2)(B).

student populations must also meet proficiency goals for a school to make AYP.⁹⁵⁷ These student populations, referred to in the statute as subgroups, include students from low-income backgrounds, from major racial and ethnic groups, with disabilities, and with limited English proficiency.⁹⁵⁸ Schools must publicly report the passage rates and include a breakdown of success by subgroup, thus holding schools accountable for the learning of every single student.⁹⁵⁹

C. NCLB'S Relationship to the IDEA

Prior to NCLB, the IDEA contained specifications concerning accountability for the education of students with disabilities; however, these accountability provisions were rarely enforced.⁹⁶⁰ This concept of required and enforced accountability for all students is the central difference between the provisions of the IDEA and NCLB.⁹⁶¹ IDEA takes an individualized approach by requiring schools to make specific services available and develop an individualized education program ("IEP") for each child with a disability.⁹⁶² NCLB takes a broader view, emphasizing the need to close achievement gaps on test scores and raise the collective scores of all students to meet state-specific proficiency levels.⁹⁶³

NCLB advanced the initiatives of the IDEA by establishing the accountability requirement, changes that likely influenced the 2004 IDEA reauthorization signed by President George W. Bush.⁹⁶⁴ The reauthorization coordinated the requirements of NCLB with the IDEA's guidelines for special education programs⁹⁶⁵ and responded to findings that the education of students with disabilities had been stalled by "low expectations and an insufficient focus on applying replicable research on

⁹⁵⁷ James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 940 (2004). For example, if in a certain year, a state determines that eighty percent of students must be proficient on the standardized assessment, then eighty percent of all the students in the school *and* eighty percent of the students within *each* subgroup must meet the proficiency standard for a school to make AYP. *See id.*

⁹⁵⁸ *Id.*

⁹⁵⁹ Judy A. Schrag, *No Child Left Behind and Its Implications for Students with Disabilities*, 16 SPECIAL EDGE 2, 1 (2003), http://www.calstat.org/publications/pdfs/edge_spring_03.pdf.

⁹⁶⁰ Stephen D. Luke & Amanda Schwartz, *Assessment & Accommodations*, 2 EVIDENCE FOR EDUC. 1, 2 (2007), <http://nichcy.org/wp-content/uploads/docs/eeaccommodations.pdf>.

⁹⁶¹ Apling & Jones, *supra* note 8, at 1.

⁹⁶² *Id.* at 1.

⁹⁶³ *Id.*

⁹⁶⁴ *See id.* at 19.

⁹⁶⁵ *Id.* at 1.

proven methods of teaching and learning.”⁹⁶⁶ These changes were intended to provide students with disabilities the right to the same education and expectations of their peers in general education classrooms.⁹⁶⁷ The 2004 reauthorization elevated the relationship between the IDEA and NCLB to a higher significance, particularly on issues related to the education of children with disabilities,⁹⁶⁸ by “providing both individualized instruction and school accountability.”⁹⁶⁹

III. SCHOLARLY LANDSCAPE

The debate over NCLB finds special education advocates and parents divided; they want high expectations for their students with disabilities but fear that students will ultimately be the party to suffer.⁹⁷⁰ The following opinions identify the provisions and aspects of NCLB that scholars believe work for and against special education.

A. Positives of NCLB’s Impact on Special Education

1. Holds Districts Accountable for the Education of all Students

Prior to the enactment of NCLB, states and districts largely excluded students with disabilities from state testing programs.⁹⁷¹ Schools cited various reasons for excluding students with disabilities from testing, including a desire to limit stress for those students, a lack of knowledge regarding test modifications and accommodations, and a goal to raise a school’s overall scores.⁹⁷² Regardless of the reasons, the exclusion from

⁹⁶⁶ Cortiella, *supra* note 9, at 8; *see also*, Richard J. Wenning et al., *No Child Left Behind: Who is Included in New Federal Accountability Requirements*, in NO CHILD LEFT BEHIND: WHAT WILL IT TAKE? 35, 42 (2002), http://www.edexcellencemedia.net/publications/2002/200202_nclbwillittake/NCLB-report.pdf (noting that in January 2001, of thirty-four states reviewed, ten percent did not have adequate testing and accountability provisions for students with disabilities).

⁹⁶⁷ Cortiella, *supra* note 9, at 8.

⁹⁶⁸ Apling & Jones, *supra* note 8, at 1.

⁹⁶⁹ Cortiella, *supra* note 9, at 10.

⁹⁷⁰ Lynn Olson, *Enveloping Expectations*, EDUC. WEEK, Jan. 8, 2004, at 8, 20, available at <http://www.edweek.org/media/ew/qc/archives/QC04full.pdf>.

⁹⁷¹ Nirvi Shah, *Including, Excluding Students with Disabilities Under NCLB*, EDUC. WEEK (May 30, 2012, 9:53 AM), http://blogs.edweek.org/edweek/speced/2012/05/including_excluding_students_with.html?qs=NCLB+_special_education_.

⁹⁷² Wenning et al., *supra* note 30, at 39.

testing was personally damaging to the students as well as to reform efforts, and the exclusion made it difficult for parents to monitor their child's progress.⁹⁷³ Now, NCLB requires states and districts to include students with disabilities in local and statewide assessments⁹⁷⁴ and for states and school districts to be held accountable for the performance of those students.⁹⁷⁵ Parents, advocates, and educators now celebrate that students with disabilities *count* in statewide assessments, fully participate in the assessments, and that their progress is made public.⁹⁷⁶

2. Allows Districts, Parents, and Lawmakers to Monitor Progress

In addition to testing and monitoring the progress of students with disabilities, each district must publish a report card every year that outlines total and subgroup AYP performance for each school in the district.⁹⁷⁷ Districts must include a wide variety of information in the report cards, including the achievement data aggregated and disaggregated by subgroup, scores in math and reading, percentage of students tested and not tested, and information on indicators used to determine AYP such as graduation rates and teacher qualifications.⁹⁷⁸ Since districts publicize these results, the report cards provide a means of comparison for parents to evaluate the quality of their child's education to the education provided at other schools in a district or throughout the state.⁹⁷⁹

3. Availability of Accommodation on Testing

Under NCLB, states must assess at least ninety-five percent of all students and students in each of the five subgroups.⁹⁸⁰ If students with disabilities need accommodations in order to take the assessments, the

⁹⁷³ *Id.*

⁹⁷⁴ 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc); *see also* U.S. DEPT. OF EDUC., FACT SHEET: NO CHILD LEFT BEHIND PROVISION GIVES SCHOOLS NEW FLEXIBILITY AND ENSURES ACCOUNTABILITY FOR STUDENTS WITH DISABILITIES, <http://www2.ed.gov/nclb/freedom/local/spcedfactsheet.pdf>.

⁹⁷⁵ U.S. DEPT. OF EDUC. FACT SHEET, *supra* note 38, at 1, 2.

⁹⁷⁶ Cassandra Cole, *Closing the Achievement Gap: What Is the Impact of NCLB on the Inclusion of Students with Disabilities?*, 4 CENTER FOR EDUC. POL'Y BRIEF: CLOSING THE ACHIEVEMENT GAP SERIES: PART III 1, 2 (Fall 2006), http://ceep.indiana.edu/projects/PDF/PB_V4N11_Fall_2006_NCLB_dis.pdf.

⁹⁷⁷ Cortiella, *supra* note 9, at 18.

⁹⁷⁸ George J. Petersen & Michelle D. Young, *The No Child Left Behind Act and Its Influence on Current and Future District Leaders*, 33 J.L. & EDUC. 343, 349 (July 2004).

⁹⁷⁹ *Id.*

⁹⁸⁰ Margaret J. McLaughlin et al., *Accountability for Students with Disabilities Who Receive Special Education: Characteristics of the Subgroup of Students with Disabilities*, INST. FOR THE STUDY OF EXCEPTIONAL CHILD. & YOUTH, 1, 3 (September 2006), available at <http://www.eric.ed.gov/PDFS/ED509859.pdf>.

school must provide those accommodations.⁹⁸¹ These accommodations allow the assessments to measure a student's knowledge and ability without the potential interference of the student's disability.⁹⁸² NCLB specifies that the number of proficient scores on alternate achievement standards should not exceed one percent of all students assessed.⁹⁸³ This alternate achievement standard is different from the grade-level achievement standards used to measure students in general education classrooms.⁹⁸⁴ According to NCLB, individual states are allowed to define alternate achievement standards as long as the standards "align with the State's academic content standards; [p]romote access to the general curriculum; and [r]eflect professional judgment of the highest achievement standards possible."⁹⁸⁵

B. Negatives of NCLB's Impact on Special Education

While proponents of the law believe the accountability and reporting requirements move special education in a positive direction, NCLB's impact on special education has been widely criticized by lawmakers, educators, and parents across the country.⁹⁸⁶ This section shifts from the views of NCLB's proponents to examine opponents' views of the law as a cause for major concern.

1. Misplaced Objectives and a Narrow Curriculum

Those in opposition to NCLB argue the law wastes already limited resources on assessments that modify curricula, change or eliminate successful programs that work specifically for students with disabilities, and force low-achieving students out of schools.⁹⁸⁷ James E. Ryan argues that rather than focusing on yearly achievement, the assessments and AYP goals are actually more about rigid benchmarks.⁹⁸⁸ The requirements of

⁹⁸¹ 34 C.F.R. § 300.320(a)(6).

⁹⁸² Cortiella, *supra* note 9, at 14.

⁹⁸³ 34 C.F.R. § 200.13(c)(2)(i).

⁹⁸⁴ U.S. DEPT. OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES: NON-REGULATORY GUIDANCE 1, 20 (August 2005), available at <http://www2.ed.gov/policy/elsec/guid/altguidance.pdf>.

⁹⁸⁵ 34 C.F.R. § 200.1(d).

⁹⁸⁶ *Adequate Yearly Progress*, EDUC. WEEK, August 3, 2004, available at <http://www.edweek.org/ew/issues/adequate-yearly-progress/>.

⁹⁸⁷ Darling-Hammond, *supra* note 14.

⁹⁸⁸ Ryan, *supra* note 21, at 941.

NCLB reduce classroom instruction to one goal: teachers teach so their students pass the state assessments so the school can meet AYP for the year.⁹⁸⁹ In response to these pressures, teachers spend increased amounts of time on complex assignments that focus on reading and math; in turn, students receive less instruction in other subjects.⁹⁹⁰

2. Limited Access to General Education Curriculum

In addition to narrowing the curriculum, NCLB also limits access to the curriculum. “If students with disabilities are to meet the goal of achieving at proficient levels by the year 2014, [these students] will need to have access to the general education curriculum.”⁹⁹¹ The requirement poses a challenge because the success of students with disabilities is dependent upon access to the general education curriculum;⁹⁹² however, oftentimes students with disabilities do not possess the same necessary skills as their peers to demonstrate knowledge regarding what they have been taught.⁹⁹³ In short, the meaning of “proficient” within the special education curriculum differs from the meaning of “proficient” for students learning based on a general education curriculum.⁹⁹⁴

3. Special Education Students as Scapegoats for Failure to Meet AYP

Meeting the proficiency requirement can be especially complex and the policies and AYP provisions create concern regarding accountability.⁹⁹⁵ In some situations, district administrators blame the performance of students with disabilities on state assessments as being the only factor that keeps a school from reaching AYP.⁹⁹⁶ “[E]ducators have been sounding the alarm that . . . special education students . . . are causing their schools” to fall short of the AYP goal.⁹⁹⁷ These types of comments could have a negative effect if they were to reach the students’ ears. Furthermore, this blame is

⁹⁸⁹ *Id.* at 933.

⁹⁹⁰ Interview by Bruce Jacobs with Linda Valli, Associate Professor of Education, University of Maryland, in College Park, Md. (Jan. 8, 2008), available at <http://www.newsdesk.umd.edu/sociss/-release.cfm?ArticleID=1576>.

⁹⁹¹ Schrag, *supra* note 23, at 10.

⁹⁹² Katherine Nagle et al., *Students with Disabilities and Accountability Reform: Challenges Identified at the State and Local Levels*, 17 J. DISABILITY POL’Y. STUD. 28, 28 (2006).

⁹⁹³ See Schrag, *supra* note 23, at 10.

⁹⁹⁴ U.S. DEPT. OF EDUC. FACT SHEET, *supra* note 38, at 1.

⁹⁹⁵ Willard Daggett & Lawrence Gloeckler, *NCLB - A Crossroads for Special Education*, INT’L. CENTER FOR LEADERSHIP IN EDUC., at 2 (2004), <http://www.leadered.com/pdf/4%20SpecEdwhitepaper.PDF>.

⁹⁹⁶ Shah, *supra* note 35.

⁹⁹⁷ Daggett & Gloeckler, *supra* note 59, at 2.

misplaced because NCLB contains a safe harbor provision.⁹⁹⁸ This provision addresses concerns that a school would fail to meet AYP because one subgroup failed to meet the state AYP goals.⁹⁹⁹ This provision states that schools can avoid being marked as failing if, during the next year, the number of subgroup students below proficiency *decreases* by ten percent when compared with the assessment results from the preceding year.¹⁰⁰⁰

4. Limited Funding

Lastly, NCLB fails to take into account the nation's financial, educational inequalities.¹⁰⁰¹ High-spending schools outspend low-spending schools "at least three to one in most states."¹⁰⁰² NCLB does provide funding, but it usually allots to less than ten percent of most schools' budgets, and the funding amount fails to meet the extreme financial needs of disadvantaged schools.¹⁰⁰³ In addition, the high cost of providing intervention services to students who fail to meet AYP is a large concern for educators and lawmakers because these services come with extensive costs.¹⁰⁰⁴

IV. CURRENT POLITICAL LANDSCAPE

Congress should have addressed all of the flaws and criticisms surrounding NCLB when the law was scheduled for reauthorization, but the legislation is still overdue for renewal.¹⁰⁰⁵ Part IV addresses Congress's reauthorization efforts and describes President Obama's proposed solution to fix NCLB's failing provisions. This section concludes by presenting three viewpoints surrounding the relationship between NCLB and the education of students with disabilities.

⁹⁹⁸ Daniel de Vise, 'Safe Harbor' Offers Shelter from Strict 'No Child' Targets, WASH. POST, Apr. 7, 2008, http://articles.washingtonpost.com/2008-04-07/news/36859627_1_adequate-progress-safe-harbor-school-scores.

⁹⁹⁹ *Id.*

¹⁰⁰⁰ U.S. DEPT. OF EDUC., NO CHILD LEFT BEHIND: A ROAD MAP FOR STATE IMPLEMENTATION 1, 13, available at <http://www2.ed.gov/admins/lead/account/roadmap/roadmap/pdf>.

¹⁰⁰¹ Darling-Hammond, *supra* note 14.

¹⁰⁰² *Id.*

¹⁰⁰³ *Id.*

¹⁰⁰⁴ Cole, *supra* note 40, at 4.

¹⁰⁰⁵ Arne Duncan, Op-Ed., *Escaping the Constraints of 'No Child Left Behind'*, WASH. POST, Jan. 6, 2012, http://www.washingtonpost.com/opinions/escaping-the-constraints-of-no-child-left-behind/2012-01/06/gIQAYmqpfP_story.html.

Congress's last serious attempt to rewrite NCLB occurred in 2007, but legislators made no progress because education groups and teachers' unions opposed a provision regarding merit pay.¹⁰⁰⁶ Efforts for reauthorization increased in 2011 as legislators from both parties began discussing an alternative way to effectively and fairly monitor student progress and hold schools accountable.¹⁰⁰⁷ Despite these efforts, as of April 2013, Congress has still not reauthorized NCLB or re-written the law.

In response to the growing criticism of the law, the Obama Administration created and released a blueprint for the reauthorization of NCLB in March 2010,¹⁰⁰⁸ which makes the receipt of funding conditional on districts taking action to improve schools and prepare students for life beyond high school.¹⁰⁰⁹ The blueprint calls for a "broad overhaul" of the NCLB and proposes to "reshape divisive provisions that encouraged instructors to teach to tests, narrowed the curriculum, and labeled one in three American schools as failing."¹⁰¹⁰ President Obama's proposed blueprint includes measures for accountability and consequences for failure but it eliminates the deadline for one hundred percent proficiency in 2014.¹⁰¹¹ Instead, students would leave high school ready for a college or a career.¹⁰¹²

The blueprint also specifically addresses meeting the needs of diverse learners, a group in which students with disabilities are included.¹⁰¹³ In addition to the existing programs, a reauthorization of NCLB would result in increased attention to including students with disabilities and improving their outcomes.¹⁰¹⁴ This attention would focus on better teacher preparedness to educate students with disabilities, improved, more accurate assessments, and a diverse curriculum that incorporates learning to meet the needs of every student.¹⁰¹⁵

¹⁰⁰⁶ Sam Dillon, *Obama to Seek Sweeping Change in 'No Child' Law*, N.Y. TIMES, Jan. 31, 2010, <http://www.nytimes.com/2010/02/01/education/01child.html?pagewanted=all>.

¹⁰⁰⁷ *Adequate Yearly Progress*, *supra* note 50.

¹⁰⁰⁸ U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010).

¹⁰⁰⁹ Dillon, *supra* note 70.

¹⁰¹⁰ Sam Dillon, *Obama Calls for Major Change in Education Law*, N.Y. TIMES, Mar. 13, 2010, http://www.nytimes.com/2010/03/14/education/14child.html?pagewanted=all&_r=1&.

¹⁰¹¹ *Adequate Yearly Progress*, *supra* note 50.

¹⁰¹² Dillon, *supra* note 70 (noting that, as of February 2010, the National Governors Association had started coordinating efforts to write standards defining what it means for a student to leave high school ready for a career or college).

¹⁰¹³ U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM, *supra* note 72, at 19.

¹⁰¹⁴ *Id.* at 5.

¹⁰¹⁵ *Id.* at 20.

The blueprint's proposal to improve the education of students with disabilities falls within one of the categories in the debate that has emerged over NCLB and its effect on students with disabilities.¹⁰¹⁶ The first argues that districts and schools should stay the course and tough it out; the second contends that students with disabilities should stay in the accountability system, but be evaluated against different standards based on different assessments; and the third maintains that districts and schools should completely remove students with disabilities from the NCLB accountability system "because it is unreasonable and unfair."¹⁰¹⁷ Based on the description of the blueprint, the changes fall somewhere between the first and the second viewpoints. The blueprint recommends staying on course in the sense that the same programs will stay in place, but aims to provide increased attention to students with disabilities. In addition, the blueprint also falls within the second viewpoint based on the suggestion of continued accountability with the addition of testing modification.

V. MENDING THE BROKEN RELATIONSHIP BETWEEN NCLB AND SPECIAL EDUCATION

The opinion expressed in the third viewpoint is a valid assertion; as it stands, NCLB's accountability system *is* unreasonable, unfair, and essentially unrealistic for students with disabilities. The problem with the third option, however, is that it suggests that legislators, educators, and parents give up on students with disabilities; this solution itself is unreasonable, unfair, and unrealistic. Instead, the federal government must recognize the unattainable expectations set by NCLB and reevaluate the current system by setting attainable goals for students with disabilities according to the students' needs.

A. Proposal

Congress should address the needs of special education students in NCLB by adapting the four main pillars of the law to fit the needs of students with disabilities. As noted in Part II, NCLB centers on research-proven effectiveness in instructional methods and materials in the classroom; accountability; the availability of parental influence,

¹⁰¹⁶ See Daggett & Gloeckler *supra* note 59, at 1.

¹⁰¹⁷ *Id.*

information, and choice; and flexibility in the use of funding.¹⁰¹⁸ After evaluating NCLB and the costs and benefits to special education, the following proposal is based on the ability to revamp the relationship between special education and the four pillars in an ideal legislative environment. The four aforementioned pillars should work in conjunction with the IEP requirements outlined in the IDEA. Collaboration between the two most significant educational policies in the nation's history will provide students with disabilities access to an inclusive education system directly tailored to their needs.

1. Research-Proven Effectiveness in Instructional Methods and Materials in the Classroom

The first way to address the issues plaguing the system is to change the assessments used in special education classrooms. Instead of testing students using the general standardized tests, states should develop specific assessments for students with disabilities. The assessments should test all subject matters, not just reading, math, and science. As a result, the assessments will not constrain students with disabilities to a rigid, narrow curriculum. In addition, the new assessments should focus on the instructional methods and materials used in special education classrooms. By assessing students in the same way they are taught, the assessments will reflect the effectiveness of the instruction. This solution is not meant to suggest that states should create an individualized assessment for each student; rather, it suggests that lawmakers and educators evaluate the methods of instruction used in special education classrooms and develop assessments based on these key methods.

The purpose of an alternate assessment is two-fold: not only will such an assessment test students' knowledge and abilities, but this type of assessment will provide concrete evidence into the effectiveness of chosen instructional methods. If students with disabilities are tested in the same way they are instructed, but still struggle to meet certain goals or objectives, then it is possible that the issues arise out of the instructional methods.

2. Accountability Through IEPs, AYP, and Frequent Assessments

While alternate assessments would remove students with disabilities from school accountability numbers as a whole, this approach still mandates accountability for students with disabilities through the use of

¹⁰¹⁸ U.S. DEPT. OF EDUC., *supra* note 1, at 1.

IEPs, the creation of a separate AYP standard, and an increase in the frequency of assessments. Traditionally, IEPs focus on a student's grasp of basic academics, "access, and/or functional skills and have had little relationship to a specific academic area or grade-level expectations."¹⁰¹⁹ In addition to the standard IEP process, this proposal recommends that IEPs also include an additional section pertaining to the state assessment. This section should outline specific goals and objectives a student should grasp based on the content of the assessment.

In turn, this aspect provides the ability to monitor progress based on the creation of separate AYP standards for use in special education classrooms. The definition of AYP should be similar to the definition used for students in the general education curriculum who take the general state assessments; the definition must specifically address how districts and schools plan to assess student ability and monitor student progress as tailored to special education curriculums.¹⁰²⁰ This separate definition of AYP should include the addition of two assessments per year for students with disabilities, one near the beginning of the academic year and one near the end. This will allow teachers, administrators, and parents to see how a child is learning at the beginning of the academic year and then evaluate the child at the end of the year. By testing twice in an academic year, progress may be measured over time. In addition, districts can monitor, address, and correct issues in a more timely manner. These changes allow for different, yet intertwined, ways to hold districts accountable for student progress.

3. Influence, Information, and Choice for Parents

This proposal maintains parental input in their child's education while also conforming their child's education to a broader set of standards. Typically, parents are involved in the creation of their child's IEP as part of a larger IEP development team.¹⁰²¹ The team is also comprised of at least a special education teacher, a regular education teacher, and a representative from the local educational agency.¹⁰²² By heightening the importance and significance of the IEP regarding standardized assessments, parents can still provide input regarding the totality of their child's education. With assessments twice per year, parents will be able to see, through the goals

¹⁰¹⁹ Jason Ballum et al., *IEP Overview*, EDUCATIONAL LAW: STUDENT-RELATED ISSUES IN PUBLIC SCHOOLS, 7, 9 (Va. Law Found., ed., 2012).

¹⁰²⁰ 20 U.S.C. § 6311(b)(2)(B) (2006).

¹⁰²¹ Ballum, *supra* note 83, at 7.

¹⁰²² *Id.*

and objectives outlined in their child's IEP, how their child progressed from assessment to assessment.

Districts and schools should provide information to parents detailing the types of special education services and assessments offered. If parents are unsatisfied with the options provided at their child's school, the parents should have the opportunity to voice this opinion and work with the rest of the IEP team to develop a reasonable solution. Districts, schools, and parents should use all means necessary to provide the best education for the student.

4. Flexibility in the Use of Funding

As with the implementation of any type of law or proposal, there must be a source of funding. This proposal proceeds on the assumption that while the states will maintain control over the educational system, the federal government will still provide some funding for special education programs. The state programs must conform to general requirements established by the federal government, such as the inclusion of mandatory accountability procedures in IEPs, testing twice per academic year, and a definition of AYP that conforms with a series of specifications.

This proposal also depends on flexibility in the way federal funding is used to support special education programs. The assessment change alone requires that states have the ability to experiment with different types of assessments. As a result, the federal government should permit the states to use the money in furtherance of continuous improvement of their special education programs. In turn, the states may use federal funding on all aspects of their special education programs.

B. Response to These Changes

These changes would likely be praised by some and condemned by others, just as NCLB has been throughout the past 10 years. While the proposal does not provide an absolute cure for every flaw within NCLB, it maintains the positive aspects while avoiding the aforementioned criticisms.

The proposal still includes testing accommodations, accountability provisions, and the ability for parents, lawmakers, and educators to monitor student progress. It also builds accommodations into the assessment by creating assessments that conform to the everyday instruction students

receive. The assessments create accountability for the tests themselves and for the instructional methods used in classrooms. When reviewing the scores, lawmakers, educators, and parents can assess a student's progress in the same classroom with the same instructor over the period of one year.

The proposal also seeks to address the common criticisms of NCLB explained in Part III. This proposal addresses misplaced objectives in districts and schools by creating two separate assessment benchmarks and assessing students modeled on daily instruction. The sole focus shifts away from achieving AYP; instead, the proposal implements a definition of AYP that molds to the special education classroom by creating two assessments to monitor progress and instruction as outlined in students' IEPs. The new assessments also address the criticism that NCLB requirements result in a limited curriculum, as they will focus on all subject matters. Finally, this proposal combats the criticism that students with disabilities serve as scapegoats when districts or schools fail to meet AYP. By implementing an AYP requirement specific to the special education classroom and curriculum, it removes students with disabilities from the overall AYP equation and eliminates the possibility of blame while still keeping a method to track progress.

Despite the ability to keep the positives and address most of the criticisms addressed in Part III, the proposal is not perfect. It is likely that critics will argue that the experimentation and development of assessments will take too long and prove too costly. While these arguments are recognized, the make up of special education classrooms has changed and districts and schools need to adapt; costs and implementation times should not bar these students from "a fair, equal, and significant opportunity to obtain a high-quality education."¹⁰²³

VI. CONCLUSION

Congress needs to reauthorize NCLB in a way that will stop leaving special education students behind. NCLB placed the spotlight on an increasing achievement gap, prompted new conversations, and introduced Congress to the need for change in the nation's educational system. NCLB's focus on accountability revealed that states must act to avoid a path where students with disabilities only encounter low expectations. By altering NCLB's key provisions, the special education curriculum will be

¹⁰²³ 20 U.S.C. § 6301.

one based on the individual and unique needs of the students.

In contrast, however, lawmakers, educators, and parents must recognize that immediate, dramatic improvement in educational performance is also unrealistic with the state of the current system. Experimentation will serve as a useful tool as districts and schools seek to realign instructional programs. In time, this experimentation will lead to services and opportunities that support and allow special education students to succeed. A new definition of AYP tailored specifically to special education classrooms, combined with a revised set of specific assessments that adapt to the needs of students with disabilities, can bring positive change in special education classrooms across the nation.