Brave New School: A Constitutional Argument Against State-Mandated Mental Health Assessments in Public Schools

"For you must remember that in those days . . . children were always brought up by their parents and not in State Conditioning Centres."

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I. INTRODUCTION

When two seemingly harmless Colorado teenagers opened fire on their classmates at Columbine High School, the previously private matter of adolescent mental health became a question of public concern. Why hadn’t anyone realized how emotionally troubled Eric Harris and Dylan Klebold were? How many other invisible victims of psychological illness were teetering on the brink of violence in American schools? One could not help but wonder whether proper mental health care, provided in a timely manner, might have averted the tragedy.\(^2\) Columbine seemed a symbol of missed opportunity, a dramatization of the high cost of our

collective failure to detect emotional illness in America's children.\textsuperscript{3} The crisis called for state action.\textsuperscript{4}

Within a year after Columbine, the United States Surgeon General had convened a conference on juvenile mental health and published a weighty report calling for the development of community-wide psychological health services.\textsuperscript{5} Shortly thereafter, President George W. Bush issued the New Freedom Commission on Mental Health, advocating universal mental health screening from pre-school through adulthood.\textsuperscript{6} By 2001, a bill had been introduced in Congress that, if passed, would authorize emotional health assessment pilot programs to commence at selected educational facilities.\textsuperscript{7} What is more, though the role of government in mental health determinations remains merely a subject of debate at the national level, the Illinois legislature has already heeded the call to action by enacting the Children's Mental Health Act of 2003, which mandates, in pertinent part, emotional health assessments for children throughout Illinois public schools.\textsuperscript{8} Indeed, so confident was the Illinois Senate of the value and propriety of increased state involvement in the provision of mental health care that it passed the Children's Mental Health Act by a unanimous vote.\textsuperscript{9}

Yet when the government has a hand in assessing emotional health there are potentially sinister consequences. One case in point is the story of Patricia Weathers, a New York mother who was unceremoniously informed by a school psychologist that her first-grade son had attention deficit disorder for which he should be treated with stimulants.\textsuperscript{10} When, after an unsatisfactory trial run on Ritalin, Ms. Weathers chose to discontinue her son's use of the drug, the school reported her to Child Protective Services for child abuse.\textsuperscript{11} The charges against Ms. Weathers were ultimately dropped,\textsuperscript{12} but the incident reveals the danger inherent in zealous

\begin{itemize}
\item \textsuperscript{3} \textit{Id.}
\item \textsuperscript{4} \textit{See id.}
\item \textsuperscript{6} President's New Freedom Commission on Mental Health, \textit{at} http://www.mentalhealthcommission.gov/reports/reports.htm (last visited Aug. 5, 2005).
\item \textsuperscript{7} Children's Mental Health Screening and Prevention Act of 2003, H.R. 3063, 108th Cong. § 3 (2003).
\item \textsuperscript{8} Children's Mental Health Act of 2003, 405 ILL. COMP. STAT. 49/15 (2003).
\item \textsuperscript{10} Kelly Hearn, \textit{Some Parents Just Say “Whoa” to School-Required Medications, Christian Science Monitor}, June 14, 2004, at 12.
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id.}
\end{itemize}
state involvement in the highly personal matter of a child's social and emotional development: governmental meddling in the constitutionally protected realm of family relations.\textsuperscript{13} This comment advances the argument that universal, school-based, emotional health assessments, now the law in the state of Illinois, unconstitutionally intrude upon a parent's right to raise a child without undue interference from the state.\textsuperscript{14} Part I traces the historical evolution of the right to parental autonomy from its common law origin to its subsequent transformation in the 1920s into a constitutionally protected right under the Due Process Clause of the Fourteenth Amendment. Part II examines the invocation of parental rights in the public school context during the past fifty years, juxtaposing the broad success of parental claims in the 1970s with the overwhelming failure of similar parental challenges in the 1990s. Part III explores the possibility that the rising tide against parental rights in the 1990s may have been stemmed by the celebrated, but quixotic, 2000 Supreme Court custody decision \textit{Troxel v. Granville}.\textsuperscript{15} The final section looks at in-school emotional health assessments in light of the reasoning of \textit{Troxel} and its progeny and suggests a constitutional approach for parents who object to statutorily mandated emotional health assessments of their children in public schools.

\section*{II. PARENTAL AUTONOMY: FROM COMMON LAW TO CONSTITUTIONAL LAW}

\subsection*{A. THE COMMON LAW BACKGROUND}

Nowhere in the United States Constitution are parents expressly guaranteed the right to raise their children without governmental interference. Yet, perhaps the absence of such a guarantee signifies not that the Framers recognized no such right, but rather that they assumed it. At the time of the Constitution's creation, a parent's interest in autonomous childrearing

\begin{itemize}
  \item \textsuperscript{13} Troxel v. Granville, 530 U.S. 57 (2000) (reaffirming, by a plurality, the constitutionally protected right of parents' care, custody and control of their children under the Due Process Clause of the Fourteenth Amendment).
  \item \textsuperscript{14} American courts refer to the right in question as "the right to familial relations" in Doe v. Heck, 327 F.3d 492 (7th Cir. 2003); "parental rights" in Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001); the right "of parents to raise their children as they see fit" in C.N. v. Ridgewood Bd. of Educ., 319 F. Supp. 2d 483, 489 (D.N.J. 2004); as well as by a number of other names. I have employed these terms and the more general "right to parental autonomy" in this Comment.
  \item \textsuperscript{15} Troxel v. Granville, 530 U.S. 57 (2000).
\end{itemize}
arguably belonged to that category of right "so generally admitted, and so seldom contested" as to afford no opportunity for its assertion until it is under siege. The parent-child relationship, perhaps more than any other relationship, was so tightly woven into the fabric of Western culture that constitutional assurances, had it even occurred to the Framers to make them, would have seemed redundant and unnecessary. The individual rights that the Framers elevated to constitutional status were quite naturally those that seemed most vulnerable to government usurpation under the English political and legal traditions that were transported to American shores. Accordingly, the one familiar intrusion into the privacy of the home—the stationing of troops within the home—did qualify for constitutional protection under the Third Amendment. Parental childrearing rights (a veritable corollary to property rights) by contrast, already enjoyed robust protection under the English common law traditions. In one commentator's colorful analogy, asserting that parents have an unassailable right to control the upbringing of their children would have been as absurdly obvious as insisting that parents have a right to clothe their children. 

There is ample evidence of parental rights' solid common law foundation. No less than an entire chapter of William Blackstone's venerable Commentaries on the Laws of England is dedicated to a discussion of the interplay between family and the law. Blackstone characterizes the parent-child relationship as "the most universal relation in nature," and describes the "power of life and death" that a father had over his child under Roman law. Blackstone concedes that the English approach is somewhat less categorical than that of its Roman antecedent, nonetheless,

18. See id. at 218-19.
19. See id. at 219.
20. Id. at 219 n.150.
23. 1 WILLIAM BLACKSTONE, COMMENTARIES *434.
24. Id.
25. Id. at *440.
26. Id. According to Blackstone, the authority of father over child under Roman law rested on the principle that "he who gave had also the power of taking away." Id.
27. Id.
the underlying principle that emerges from Blackstone’s description of the law’s view of the family is that the nature of a parent’s authority over a child was such that the state could no sooner interfere with that relationship than it could interfere with a private party’s dominion over any other chattel.  

This profound regard for parental authority has deep-seated historical justifications—both socio-economic and cultural. American society, like its English cousin, was largely agrarian, and children were conceived and raised in no small part to serve as extra hands on the farm and to provide for parents in their dotage. In other words, children had a distinctly economic value to their parents. However distasteful it might seem to cast children as property in the eyes of the law, an unsentimental look at the realities of rural life reveals the common sense behind the historical analogy.

From a cultural standpoint, the power of parent over child had its roots in an indisputable source of Western moral authority: the Hebrew Bible. Among the Ten Commandments, the exhortation to honor one’s father and mother ranks fourth, preceded only by Commandments that concern man’s relationship to God, and placed ahead of the remaining Commandments that dictate acceptable conduct in the community. The implication is that the parent-child relationship ranks somewhere between the spiritual world and the temporal world. Indeed, contemporary judicial references to “the God-given and constitutional right of a parent,” as well as such common law characterizations of the parental right as “sacred” expose the enduring biblical underpinnings to the law’s conception of parental authority.

Whether biblical and early English common law notions of parental authority ought to in any way color our modern legal approach to the family is certainly open to debate. However, at a minimum, it is undeniable that this was the cultural and legal landscape that informed the Framers of the Constitution in determining which rights required constitu-

30. See id. at 966 n.57.
31. See Moskowitz, supra note 22, at 624 n.5.
32. Exodus 20:12 (King James).
34. Nebraska ex rel. Kelley v. Ferguson, 144 N.W. 1039, 1043 (Neb. 1914).
36. See Witte, supra note 17, at 219.
tional protection and which stood on sufficiently firm footing without constitutional support.  

It cannot even be said that there was any perception at common law that parental authority was surrendered to the state when the child crossed the threshold of a public school. This is abundantly borne out by nineteenth century American case law. Prior to the advent of compulsory education, American courts consistently upheld a parent’s right (on occasion on little more than a whim) to exempt a child from curricular requirements. In *Morrow v. Wood*, a father successfully challenged a school geography requirement. The Wisconsin court recognized no diminution in parental authority in favor of the state premised on the child’s attendance at a state-run school. In the court’s opinion, the parent who chooses to send a child to public school nonetheless retains the right to determine what is best for the child, and in no way “impliedly clothes the teacher with that power.”

In an Illinois decision, parents objected to their child’s participation in a bookkeeping class. When the child, with her parents’ blessings, excused herself from the class, she was forthwith expelled from school. The student and her parents brought an action in trespass against the school, challenging the school’s authority to suspend the girl for declining to attend a class. The Illinois Supreme Court refused to uphold the suspension, reasoning that “law givers in all free countries... have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian.”

Even after compulsory education laws went into effect, the common law preference for parental over school authority survived. In *State ex rel. Sheibley v. School District No. 1*, a Nebraska father sought to remove his daughter from a grammar class solely on the arguably frivolous grounds that he disapproved of the way the subject was being taught.

37. Id. at 217-18.
39. See, e.g., *Morrow v. Wood*, 35 Wis. 59 (Wis. 1874).
40. Id. at 65.
41. Id.
42. Id.
43. Id.
44. Rulison v. Post, 79 Ill. 567 (Ill. 1875).
45. Id. at 569.
46. Id. at 569-70.
47. Id. at 573.
48. Moskowitz, supra note 22, at 637.
49. Sheibley, 48 N.W. at 394.
Nebraska Supreme Court categorically rejected the school’s contention that school discipline and order would suffer if Anna Sheibley were permitted to exempt herself from the class.50 Juxtaposing the father’s enduring concern for the welfare of his child with the teacher’s less compelling “temporary interest”51 the Nebraska court recognized the father’s superior claim, and upheld his right to remove his daughter from the class.52 To force the child to remain in the class against her father’s wishes, the court argued in language uncannily prophetic of later due process analysis,53 would be “arbitrary and unreasonable.”54 Although these words have the familiar ring of mere rationality review, in Sheibley, as in the seminal parental rights cases that would subsequently transform the parental common law right into a constitutionally protected interest, they were used in a kind of reverse rational basis test that favored individual right over state prerogative.55 Under reverse rational basis review, when state legislation and parental wishes conflicted, it was the burden of the state to show that the educational decision made by the parent was unreasonable.56 As long as the parent had a rational reason for her decision, courts would champion that decision and protect it from incursions by the state legislature.57 Put another way, even legislation deemed reasonable in the abstract would give way to arguably rational parental decisions when the two were incompatible.58

B. THE METAMORPHOSIS FROM COMMON LAW TO CONSTITUTIONAL LAW

The Nebraska judges who upheld Mr. Sheibley’s right to remove his daughter from a core course in a mandatory public school environment made no reference to the United States Constitution.59 In 1891, when the case was decided, there was no constitutional provision to which Mr. Sheibley could turn when state legislation or school policy threatened to override his judgments about his daughter’s education.60 However, just a
generation later, a parent's interest in controlling the education of his children would be recognized as an implicit right under the Due Process Clause of the Fourteenth Amendment.61

The Fourteenth Amendment promise that "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law,"62 initially understood merely as a guarantee of procedure,63 over time came to be construed as an assurance of a host of substantive rights so basic to liberty as to be implicitly protected against all but the most essential and minimally intrusive legislation.64 As early as the 1870s, even the Slaughter-House Cases' narrow interpretation of the reach of the Fourteenth Amendment65 contained hints of the rationale behind substantive due process percolating under the surface. In his dissenting opinion to that case, Justice Bradley forcefully argued for Fourteenth Amendment incorporation of fundamental principles of liberty rooted in English legal traditions.66 By the 1900s, it was acknowledged by members of the Court that certain fundamental rights predated the advent of government and were implicitly protected by the Due Process Clause of the Fourteenth Amendment.67 In Lochner v. New York, the controversial case that lent its name to this maligned era of judicial activism, even the skeptic Justice Holmes admitted in his dissent that the Constitution could not abide a statute that infringed "fundamental principles as they have been understood by the traditions of our people and our law."68 Among the Supreme Court decisions that defined those "fundamental principles" deserving of Fourteenth Amendment protection were two cases that pitted parental rights against the authority of the state in the realm of public education.

The first public school parental rights case, Meyer v. Nebraska, concerned a Nebraska statute that forbade schools—both private and public—to teach any modern foreign language to any child who had not successfully passed the eighth grade.69 It was feared that immigrant children, instructed in their native German tongue, might, by dint of linguistic

61. See generally Meyer v. Nebraska, 262 U.S. 390 (1922) (standing for the proposition that parents have a constitutional right to control the education of their children).
63. See Mullins v. Oregon, 57 F.3d 789, 795 (9th Cir. 1995).
66. Id. at 111-24 (Bradley, J., dissenting).
affinity, feel a continued allegiance to Germany. A harbinger of the modern-day English-only movement, the statute, part of the nationwide "100 percent Americanism" campaign, sought to ensure that America's celebrated "huddled masses" became patriotic, English-speaking American citizens. Similar anti-foreign language legislation could be found on the books in twenty-two other states as well. When a Nebraska teacher was charged and convicted of "the direct and intentional teaching of the German language," and the conviction was upheld by the Nebraska Supreme Court, the United States Supreme Court reviewed the case, focusing, in particular, on the right of parents to afford their children instruction in German despite the contrary wishes of the state.

The Supreme Court deemed the Nebraska statute an unconstitutional usurpation of a parental right, asserting that the liberty guaranteed under the Fourteenth Amendment includes the right to "marry, establish a home and bring up children." Although the Court fully recognized the permissibility of the state's expressed goal of encouraging patriotism, it categorically refused to validate the means the state had chosen. "Perhaps," the Court declared, "it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means."

Just two years later, the Supreme Court was again asked to weigh in on the proper parent/state balance of control over a child's education. In Pierce v. Society of Sisters, the Supreme Court considered the validity of the Oregon compulsory education statute that mandated attendance at public schools to the exclusion of private institutions. Here again, the Court found the Oregon statute unconstitutional because it "unreasonably

72. Ross, supra note 70, at 131.
73. Id. at 134.
74. Id. at 133.
75. Meyer, 262 U.S. at 397.
76. Id. at 391.
78. Meyer, 262 U.S. at 399.
79. Id. at 401.
80. Id.
interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."82 Without a "general power of the [s]tate to standardize its children,"83 the elimination of the private school option was necessarily unreasonable. At the same time, the Pierce Court did acknowledge the power of the state to regulate schools, which included the authority "to inspect, supervise and examine them, their teachers and pupils."84 Furthermore, the state has the right to require "that certain studies plainly essential to good citizenship must be taught."85 After Pierce, it would seem clear that schools had unquestioned authority to manage schools as they saw fit, and mandate attendance in civics lessons.

Soon after the Meyer and Pierce decisions were handed down, People ex. rel. Vollmar v. Stanley, a Colorado Supreme Court decision, explicitly set forth a standard for the balance of authority between parent and public school.86 Following the logic of Pierce, the Colorado Supreme Court held that parents had a right to remove their children from any public education class with the exception of those that taught good citizenship.87 Because the father in this Colorado case had sought to remove his child from a biology class, a course of study with no relationship to civic education, the father's request was upheld.88 Almost as if in anticipation of the controversies that would plague parents and public schools later in the century, the Colorado Supreme Court insisted that parents had both the right to send their children to public schools and to choose what their children would study.89 "The school board," the court states, "cannot make the surrender of the second a condition of the enjoyment of the first."90

Although most of the substantive due process jurisprudence of the Lochner era was repudiated by the Court by the end of the 1930s,91 the parental rights established by the Meyer and Pierce decisions survived.92 Indeed, Meyer and Pierce would serve, in the 1960s and 1970s, as the

82. Id. at 534-35.
83. Id. at 535.
84. Id. at 534.
85. Id.
87. Id. at 614.
88. Id.
89. Id.
90. Id.
92. Ross, supra note 70, at 179-80.
foundation for the Court's personal liberties jurisprudence, establishing the authority upon which the Court built its right to privacy in the controversial *Roe v. Wade*.  

As fundamental privacy rights jurisprudence matured, the Supreme Court developed a tiered approach to resolving challenges to intrusive state legislation. Under traditional standards of judicial review of state legislation, a statute passes constitutional muster by simply bearing a reasonable relationship to some permissible state goal. However, a standard more stringent than mere rational basis review evolved for statutes that touched upon rights deemed to be fundamental. In such cases, statutes were to be subjected to strict scrutiny, a two-pronged test of constitutionality requiring both a compelling state interest and a narrowly tailored means of achieving that interest.

Opponents of parental rights are quick to point out that there is no mention of strict scrutiny in *Meyer* and *Pierce*, and that the standard applied in these cases—and, by extension, the appropriate standard for all subsequent parental rights claims—is a mere rational basis review. It is correctly noted, however, that contemporary due process tiered scrutiny had not yet been enunciated by the Court when *Meyer* and *Pierce* were decided, and that there is evidence in those decisions themselves to indicate that the Court (though it lacked a name for its process) was applying something with more bite than today's rational basis review. The additional bite that readers correctly perceive in *Meyer* and *Pierce* is the implicit employment of the reverse rational basis standard that was explicitly used in the *Sheibley* case. Under this standard, even reasonable state legislation is irrational—and therefore unconstitutional—when it coercively interferes with a parent's reasonable decision regarding the raising of a child. As a result of these conflicting readings, although it was these parental rights cases that spawned the development of fundamental privacy rights jurisprudence, it remained unclear whether parental

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93. *Id.*  
96. *Id.*  
98. *Id.*  
100. *Herndon*, 89 F.3d at 178.  
101. *See supra* Part IA and note 55.  
autonomy itself should command heightened judicial scrutiny or mere modern day rational basis review.\textsuperscript{103}

III. PARENTAL RIGHTS FROM THE 1970S TO THE 1990S: A DIMINISHING VALUE

However murky the \textit{Meyer/Pierce} legacy might have been for parental autonomy, during the 1960s and 1970s, the tension between parental rights and school authority over children was resolved resoundingly and consistently in favor of parents.\textsuperscript{104} Whether parents objected to controversial curricula or intrusive school regulations, courts were overwhelmingly sympathetic to their claims.\textsuperscript{105} In 1969, in the Seventh Circuit, a parent successfully challenged the authority of the school to dictate appropriate hair length for boys.\textsuperscript{106} The Seventh Circuit reasoned that, in this case, the parent of the boy had no objection to the length of the boy's hair and refused to recognize the authority of the school to second-guess a decision commonly arrived at within the family.\textsuperscript{107}

Similarly, in New Jersey in 1971, a family demanded the right to exempt their children from the mandatory sex education program in place at the public school.\textsuperscript{108} The New Jersey court agreed that parents ought to have the right to remove their child from the class, bemoaning the apparent diminution of parental authority as "the great sovereign state forces its way into the home as a foster parent."\textsuperscript{109}

Soon thereafter, a district court in Pennsylvania considered a constitutional claim against a public junior high school in \textit{Merriken v. Cressman}.\textsuperscript{110} The junior high had introduced a drug abuse prevention program that included a test aimed at identifying likely candidates for illegal drug use and addiction.\textsuperscript{111} Parents were given advance notice of the test, and it was administered only to those children whose parents had affirmatively given consent.\textsuperscript{112} The court determined that the consent obtained by the school

\begin{itemize}
  \item \textsuperscript{103} \textit{Herndon}, 89 F.3d at 178.
  \item \textsuperscript{104} See Moskowitz, \textit{supra} note 22, at 624-25.
  \item \textsuperscript{105} \textit{Id}.
  \item \textsuperscript{106} Breen \textit{v. Kahl}, 419 F.2d 1034 (7th Cir. 1969).
  \item \textsuperscript{107} \textit{Id}. at 1037-38.
  \item \textsuperscript{109} \textit{Id}. at 839.
  \item \textsuperscript{111} \textit{Id}. at 914.
  \item \textsuperscript{112} \textit{Id}.
\end{itemize}
was void because it failed to inform parents adequately of the nature of the exam and the potential uses of the test results.\textsuperscript{113}

The court was further persuaded by the testimony of child psychologists who warned of potentially dangerous consequences of such testing.\textsuperscript{114} The psychologists expressed a concern that the test might function as a self-fulfilling prophesy for a child positively identified as a likely drug abuser.\textsuperscript{115} Some children might feel an urge to use drugs in order to meet their community's pre-formed expectations.\textsuperscript{116} Students who were positively identified by the test could find themselves the objects of derision and contempt at school.\textsuperscript{117} Indeed, according to testifying psychologists, even students who bowed out of taking the test, either of their own volition or at their parents' behest, might be viewed suspiciously as having something to hide, and suffer the implicit label of a future drug abuser.\textsuperscript{118}

The court also objected to the highly personal nature of the questions posed in the questionnaire, such as whether the child felt loved at home and whether his parents kissed him when he was small.\textsuperscript{119} With regard to these types of questions, the court declared that the parent-child relationship is more deserving of constitutional protection than any other relationship, save marriage.\textsuperscript{120} "This court can look upon any invasion of that relationship as a direct violation of one's constitutional right to privacy."\textsuperscript{121} The Pennsylvania court deemed the administration of the exam, without proper parental permission, an unconstitutional infringement of the right to familial privacy.\textsuperscript{122}

Somehow, however, with the passage of a scant twenty years, the parent-child relationship became less deserving of constitutional protection. A mere generation after \textit{Merriken}, in 1995, the Sixth Circuit would consider a parental complaint reminiscent of \textit{Merriken} and blithely find no violation of a constitutional right.\textsuperscript{123} When a third grade boy in Michigan was subjected to counseling and psychological testing without his parents' permission, the Sixth Circuit affirmed the district court decision that the

\begin{flushleft}
\textsuperscript{113} Id. at 920.  \\
\textsuperscript{114} Id. at 915.  \\
\textsuperscript{115} Id.  \\
\textsuperscript{116} \textit{Merriken}, 364 F. Supp. at 915.  \\
\textsuperscript{117} Id.  \\
\textsuperscript{118} Id.  \\
\textsuperscript{119} Id. at 918.  \\
\textsuperscript{120} Id.  \\
\textsuperscript{121} Id.  \\
\textsuperscript{122} \textit{Merriken}, 364 F. Supp. at 922.  \\
\textsuperscript{123} Newkirk v. E. Lansing Public Sch., 57 F.3d 1070 (6th Cir. 1995).
\end{flushleft}
parents had failed to state a claim. Clearly, however protective of family autonomy American courts had been in the 1970s, by the 1990s, the mood of the country had changed. When adjudicated in the 1990s, parental complaints nearly identical to those litigated in the 1970s produced conclusions diametrically opposed to decisions reached just two decades earlier.

When parents in Boston challenged their children’s mandatory participation in a sex education program far more explicit and controversial than the program successfully evaded by parents in New Jersey in the 1970s, a court characterized their claim as an attempt to “dictate the curriculum at the public school to which they have chosen to send their children.” The First Circuit shared neither the New Jersey court’s concern that the state was playing foster parent nor the Colorado Supreme Court’s recognition at the beginning of the century that a parent should not be forced to choose between exercising the right to public education and the right to control the upbringing of their child.

The Boston parents’ complaint in *Brown v. Hot, Sexy and Safer Products* stemmed from the failure of the school to offer parents the opportunity to remove their children from a mandatory AIDS education assembly. The tone of the assembly was intended to be accessible and entertaining, but the result was a familiarity and vulgarity that ran contrary to the manner in which a number of parents had planned to introduce their children to the sensitive and private subject of sexual activity. Parents claimed that by refusing to permit them to exempt their children from the assembly, the school had intruded upon their Fourteenth Amendment right to guide their children’s education. The First Circuit’s rejection of the parents’ complaint was founded on the notion that the *Meyer* and *Pierce* decisions in no way intended the breadth of the parental authority to include the “broad-based right to restrict the flow of information in the public schools.”

From that point on, the state would be the jealous arbiter of what to teach the children entrusted to its public schools. Curricular choices were increasingly off limits to parents. Even school programs with a dubious educational function could be insulated from parental challenge by
emphasizing their educative components. Such was the case with public school community service requirements, popular in the 1990s. The significance of the distinction between curricular and non-curricular school policies is handsomely demonstrated by the Second Circuit’s resolution of one family’s constitutional challenge to a mandatory community service program in place in a New York High School.\textsuperscript{130} When the Immediato family confronted their school’s community service requirement, they shrewdly sought to distinguish the service requirement from curriculum, focusing the court’s attention on the difference between the mere exposure to information in school (clearly the purview of the state) and those instances in which a school program requires the student to act in a manner that may be contrary to a parent’s wishes.\textsuperscript{131} Ultimately, the claim was unsuccessful because the Second Circuit concluded that the purpose of the service requirement was nonetheless to teach civic responsibility, and therefore the program was curricular in nature.\textsuperscript{132}

If the 1990s came to stand for the general proposition that parents no longer had a right to remove a child from required curricula, the case was somewhat different when school policies unabashedly exceeded the school’s traditional mandate to teach and evaluate students’ academic progress. Sex education, though controversial and admittedly value-laden, is still plainly the transfer of knowledge from teacher to student.\textsuperscript{133} However, when in a number of schools sex education was expanded to include condom distribution to junior and senior high school students, there was a distinctly extra-curricular quality to the school action.\textsuperscript{134} The tension between school authority and parental autonomy once again reared its ugly head in courts across the nation. The question raised by in-school condom distribution was whether parents can claim any greater right to control of their children when the school moves beyond its traditional mandate to educate and acculturate children.\textsuperscript{135} Despite the courts’ new-found preference for public schools over parents in matters of curriculum, deference to schools seems less appropriate when school programs exceed the competency and mandate of schools to impart knowledge and test

\textsuperscript{132} \textit{Immediato}, 873 F. Supp. at 853.
\textsuperscript{133} See generally Brown, 68 F.3d 525.
\textsuperscript{135} Id.
student retention of that knowledge. These issues were resolved, albeit unharmoniously, in two 1990s cases.

In 1993, a New York family challenged the local public school's in-school condom distribution program, claiming an infringement of their constitutional right to control the upbringing of their child without state interference. The New York court in *Alfonzo v. Fernandez* began by recognizing parental rights as a "well recognized liberty interest[,]" thereby triggering strict scrutiny's twin requirements: compelling state interest and narrow tailoring. Next, the court determined that distributing condoms in school constituted an infringement of the parental right because it occurred in the coercive setting of mandatory public education without an opportunity for parents to opt out. The court conceded that the state's interest in preventing the spread of AIDS constituted a compelling state interest, but concluded that in-school distribution of condoms, absent an opt-out for parents who object, is insufficiently narrowly tailored to meet that end.

Just a couple of years later, however, the Supreme Judicial Court of Massachusetts considered a nearly identical condom distribution plan after a similar parental complaint. The Massachusetts court agreed that raising a child without undue interference by the state is a fundamental right; however, unlike its New York counterpart, the Massachusetts court was satisfied that the condom distribution program did not infringe upon that right because there was no compulsion on the part of the state. The court reasoned that because the student was free to take or refuse a condom, there was no state coercion. The Massachusetts court was able to avoid the application of strict scrutiny by determining that there had been no infringement of a parental right, because there was no compulsion on the part of the state.

Despite the mounting hostility to parental autonomy claims in the 1990s, the condom distribution cases indicate that parents still had a greater

136. *Id.*
138. *Id.* at 265.
139. *Id.* at 266.
140. *Id.* at 266-67.
142. *Id.* at 585.
143. *Id.*
144. *Id.* at 586.
chance of prevailing over public schools when the school policy in question exceeded mere teaching and academic testing. Under Alfonso, non-curricular school programs would have to contain a parental opt-out to pass constitutional muster.\(^{146}\) while under Curtis, no parental opt-out is required as long as students remain free to not participate in the program.\(^{147}\) Under either standard, though, it would appear that a non-curricular program providing neither student nor parent the opportunity to refrain from participation could run afoul of due process protections.

IV. *Troxel v. Granville*: A Boon for Parental Rights in the Public School Context?

The tug-o-war between parents and public schools, dramatized by the condom distribution cases of the 1990s, remains unresolved by the Supreme Court.\(^{148}\) Nevertheless, in the 2000 term, the Court did have occasion, in *Troxel v. Granville*, to address the larger question of the propriety of state assumption of parental decision-making.\(^{149}\) After nearly a century of silence on the question of parental autonomy, the Court shook the dust from the *Meyer* and *Pierce* decisions\(^{150}\) and reaffirmed the beleaguered due process parental right to the care, custody and control of children.\(^{151}\)

*Troxel* concerned a dispute over the visitation rights of grandparents.\(^{152}\) Tommie Granville had two daughters out of wedlock with Brad Troxel.\(^{153}\) After the couple separated in 1991, Brad returned home to live with his parents, frequently bringing his daughters to their house for visitation.\(^{154}\) In 1993, Brad committed suicide and, soon thereafter, Tommie resolved to reduce the frequency of her daughters' visits with their grandparents, despite their protestations.\(^{155}\) The Troxels turned to the courts, filing suit against Tommie Granville under a Washington statute

\(^{146}\) *Alfonso*, 606 N.Y.S.2d at 267.
\(^{147}\) *Curtis*, 652 N.E.2d at 585.
\(^{149}\) *Troxel*, 530 U.S. 57.
\(^{150}\) *Id.* at 65 (resurrecting *Meyer* and *Pierce* as authority for the *Troxel* decision).
\(^{151}\) *Id.*
\(^{152}\) *Id.* at 68.
\(^{153}\) *Id.* at 60.
\(^{154}\) *Id.*
\(^{155}\) *Troxel*, 530 U.S. at 60-61.
that authorized the court to order visitation for any person, if, in the court's opinion, such visitation served the best interests of the child.\textsuperscript{156}

The Washington legislature had, for purposes of visitation, given the courts power over the children of the state of Washington superior to that of their parents.\textsuperscript{157} The constitutional question presented by such a broad grant of authority was whether it could be exercised without offending Tommie Granville's constitutional right to raise her children without undue interference from the State.\textsuperscript{158} In a plurality decision penned by Justice O'Connor, the Supreme Court determined that the Washington statute, as applied to Tommie Granville, violated the Constitution by infringing on Tommie's "fundamental parental right."\textsuperscript{159} Citing to Meyer, in his concurring opinion, Justice Souter noted that if a judge were to be permitted to wield her authority to grant visitation of any duration to whomever she deemed deserving, the "right of upbringing would be [nothing more than] a sham."\textsuperscript{160} With the law's traditional presumption that a fit parent acts in the best interests of her child as its justification,\textsuperscript{161} the plurality forcefully declared that under normal circumstances the State is not entitled "to inject itself into the private realm of the family"\textsuperscript{162} by replacing its judgment for that of a fit parent.\textsuperscript{163}

If there had been any doubt about the continuing vitality of Meyer and Pierce in modern due process jurisprudence,\textsuperscript{164} the Troxel plurality thoroughly dispelled it.\textsuperscript{165} Indeed, the Supreme Court's decision in Troxel may have tipped the balances in favor of parental choice even in cases involving mandatory school policies.\textsuperscript{166} Although the facts of the Troxel case required the Court to resolve the relative authority of parent and state only in the arena of custody and visitation, the plurality cited to Meyer's holding that parents have a right to control the education of their children.\textsuperscript{167} By unabashedly using the Meyer and Pierce education cases as authority for its decision in a visitation dispute, the Court suggested that the

\begin{itemize}
\item \textsuperscript{156} Id. at 61.
\item \textsuperscript{157} Id. at 67.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id. at 67.
\item \textsuperscript{160} Id. at 78 (Souter, J., concurring opinion).
\item \textsuperscript{161} Troxel, 530 U.S. at 68.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. at 68-69.
\item \textsuperscript{164} Ross, supra note 70, at 182-83; Bloom, infra note 166, at 170-71.
\item \textsuperscript{165} Troxel, 530 U.S. at 68.
\item \textsuperscript{166} Ira Bloom, The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice, 32 J.L. & EDUC. 139, 169 (2003).
\item \textsuperscript{167} Troxel, 530 U.S. at 78 (Souter, J., concurring opinion).
\end{itemize}
right to parental autonomy exceeds the narrow category of custody, extending to encompass the rights of parents in the realm of public education.\textsuperscript{168} Furthermore, the plurality in \textit{Troxel} was particularly critical of the district court's flouting of the venerable, though increasingly neglected, presumption that "fit parents act in the best interests of their children."\textsuperscript{169} Indeed, by reintroducing the presumption of a fit parent's good faith in childrearing, the plurality suggested an approach to parental rights cases not unlike the reverse rational basis standard of \textit{Meyer} and \textit{Pierce}.\textsuperscript{170} Where earlier courts had required a reasonable decision on the part of the parent, O'Connor and the plurality demanded a nearly analogous "fitness" on the part of the parent. Once this minimal threshold is met, it seemed, both O'Connor and her predecessors were willing to recognize the superior authority of parent over state.

Indeed, it was just this kind of optimistic reading of \textit{Troxel} that spawned a spate of law review articles sporting such up-beat titles as "The New Era of Parental Autonomy."\textsuperscript{171} Certainly in Illinois, the earliest indications were that parents had won a broad and substantial victory in \textit{Troxel}.\textsuperscript{172} Just on the heels of the \textit{Troxel} decision, the Illinois Supreme Court entertained a parental challenge to the constitutionality of a third-party visitation statute in \textit{Lulay v. Lulay}.\textsuperscript{173} The Illinois Supreme Court deemed the statute an unconstitutional infringement of parents' fundamental liberty interest in controlling the upbringing of their children.\textsuperscript{174} Despite scholarly concerns that the \textit{Troxel} decision had avoided the term "fundamental right"\textsuperscript{175} and was resolved without explicit reference to the level of scrutiny applied,\textsuperscript{176} the \textit{Lulay} decision cites directly to \textit{Troxel} for the proposition that parental autonomy is a fundamental right triggering strict scrutiny.\textsuperscript{177}

However, the conclusion that strict scrutiny should be applied to infringements of parental rights in visitation cases\textsuperscript{178} did not mean that courts

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\item \textsuperscript{168} Bloom, \textit{supra} note 166, at 172.
\item \textsuperscript{169} \textit{Troxel}, 530 U.S. at 68-69.
\item \textsuperscript{170} See discussion \textit{supra} Parts IA and B.
\item \textsuperscript{171} Richard F. Storrow & Sandra Martinez, "Special Weight" For Best-Interests Minors in the New Era of Parental Autonomy, 2003 Wis. L. Rev. 789.
\item \textsuperscript{172} \textit{Lulay v. Lulay}, 739 N.E.2d 521 (Ill. 2000).
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.} at 534.
\item \textsuperscript{175} \textit{Id.} at 529-30.
\item \textsuperscript{176} Storrow, \textit{supra} note 171, at 825.
\item \textsuperscript{177} \textit{Lulay}, 739 N.E.2d at 531-32.
\item \textsuperscript{178} \textit{Id.} at 532.
\end{itemize}
would find strict scrutiny appropriate in the public school context. Predictably, Troxel had no impact on the resolution of conflicts over mandatory course requirements. In the Second Circuit, the court made the narrow determination, even post-Troxel, that when “parents seek . . . to exempt a child from an educational requirement . . . rational basis review applies.” In Leebaert v. Harrington, a father sought to exempt his son from a sex education class, failing as miserably post-Troxel as those who had mounted challenges to mandatory courses in the 1990s.

Clearly, Troxel had not managed to turn back the clock to 1971 when sex education was regarded as a personal matter that parents had the right to control. Moreover, in Vines v. Board of Education of Zion School District, an Illinois case, the court recognized Troxel, but found that rational basis was the appropriate standard in determining the constitutionality of a school uniform policy. However, what is intriguing about these apparently unsuccessful post-Troxel public education cases is the specificity with which the lower courts felt compelled to identify the kind of parental interest that merits only rational basis review. While both of these courts determined that a rational basis standard applies, both narrowly confined rational basis review to parental rights in the public school context, specifically as they relate to either dress codes or the flow of information in the public school.

In C.N. v. Ridgewood Board of Education, a U.S. district court considered a school administered questionnaire that posed highly personal questions, the results of which were to be used in aggregate to aid in the development of community programs. The court found no constitutional violation because of the voluntary nature of the questionnaire. Before the questionnaire was administered, parents were notified and given an opportunity to assess the questionnaire. The court acknowledged that the information gathered by the questionnaire was precisely the kind that is entitled to privacy protection, but was satisfied that there had been no invasion of privacy because the information was available only in “non-

179. E.g., Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001).
181. Id. at 136-37.
182. See generally Brown v. Hot, Sexy and Safer Prods., 68 F.3d 525 (1st Cir. 1995).
185. Id. at 497.
186. Id.
identifiable, aggregated form."\textsuperscript{187} Furthermore, the court inferred that parents would have understood from the school mailings about the questionnaires that failure to respond constituted an implicit agreement to the administration of the questionnaire to their children.\textsuperscript{188} The court concluded that a "voluntary, anonymous survey made with notice of opt-out possibilities to parents" does not constitute an intrusion into the constitutionally protected right to raise a child without governmental interference.\textsuperscript{189} The value of this decision for proponents of parental rights is this: in finding a school action constitutional, the court chose to hang its hat on the notice and opt-out provision granted to parents and the anonymous nature of the survey.

A voluntary survey was at issue in \textit{Fields v. Palmdale School District} as well.\textsuperscript{190} In \textit{Fields}, elementary school children were asked to respond to a survey featuring explicit questions about sex.\textsuperscript{191} The purpose of the survey, announced in the parental consent form, was to gather community-wide information about the exposure of children to trauma.\textsuperscript{192} Some parents claimed that the explicit nature of the questions violated their fundamental right to introduce their children to sexual matters as they saw fit, without interference from the State.\textsuperscript{193} Having framed their interest in terms of control of the flow of information, the California parents virtually sealed their fate. The court naturally analogized their claim to that of the parents in \textit{Brown v. Hot, Sexy and Safer Productions, Inc.}\textsuperscript{194} As a result, the court merely reiterated \textit{Brown}'s position that the right to parental control of a child's education does not encompass the right to control the flow of information in public schools.\textsuperscript{195}

The circumstances were much different in the Seventh Circuit case of \textit{Doe v. Heck}, in which county caseworkers responded to rumors of corporal punishment at a private Christian elementary school by conducting interviews about corporal punishment with students without the consent of their parents.\textsuperscript{196} The parents claimed that the caseworkers' conduct constituted a violation of their Fourteenth Amendment right to "familial

\textsuperscript{187} \textit{Id.} at 496.
\textsuperscript{188} \textit{Id.} at 498.
\textsuperscript{189} \textit{Id.}
\textsuperscript{191} \textit{Id.} at 1218-20.
\textsuperscript{192} \textit{Id.} at 1219.
\textsuperscript{193} \textit{Id.} at 1220-21.
\textsuperscript{194} \textit{Id.} at 1223.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} Doe v. Heck, 327 F.3d 492, 499 (7th Cir. 2003).
The Seventh Circuit averred that after *Troxel* it was not clear what level of scrutiny ought to be applied in such cases, but claimed that *Troxel* made it clear that some form of heightened scrutiny is required and opted for a balancing test.198

V. PARENTAL RIGHTS AND THE CHILDREN'S MENTAL HEALTH ACT OF 2003

The Children's Mental Health Act of 2003 comprises a comprehensive plan for improving the provision of mental health services to Illinois children.199 Section 15 of the Act addresses the role of public schools in the overall statutory scheme.200 The language of Section 15(b), as it relates to the development of school policy, reads as follows:

> Every Illinois school district shall develop a policy for incorporating social and emotional development into the district's educational program. The policy shall address teaching and assessing social and emotional skills and protocols for responding to children with social, emotional, or mental health problems, or a combination of such problems, that impact learning ability.201

Section 15 clearly lays out three distinct types of action which Illinois school districts must take in order to comply with the statute: curricular revisions to include the teaching of emotional skills, the assessment of emotional skills, and the development of procedures for responding to students with identified problems.202

The first prong of the policy concerns the inclusion of social and emotional health as components of health education.203 Certainly emotional health—like sex education—is a sensitive and value-laden subject, and some parents will inevitably object to the State's characterization of good emotional health;204 nonetheless, any parental challenge to this educative
component of the statutory mandate is likely to suffer the fate met by parental challenges to sex education. By determining what children ought to study, the school is operating well within its area of expertise and is doing nothing more than exercising its essential mandate to teach.\textsuperscript{205} Time and again, American courts have emphatically told parents that the Constitution affords no parental right to control the flow of information (including state-adopted value judgments) to students in public schools.\textsuperscript{206} Just as the parental challenge to the sex education program reviewed in the Second Circuit's \textit{Leebaert v. Harrington} merited only rational basis review, so too will the inclusion of emotional health standards in the health curriculum.\textsuperscript{207}

What exactly is contemplated, however, by the statutory mandate that such policies also address "assessing social and emotional skills"\textsuperscript{208} is less clear and potentially of greater constitutional concern to parents. It is unquestionably the prerogative of public schools to "test" their students;\textsuperscript{209} however, traditional academic testing (Can the student define depression?) and psychological testing (Is this student at risk for depression?) are two very distinct matters. Moreover, it is not at all clear that the language in the \textit{Pierce} decision, affirming a school's authority to test its students, applies to the latter variety of testing. The statute itself does not explicitly indicate which type of assessment is intended; however, the ordinary standard of statutory interpretation is to read the statute as a whole, construing the meaning of each provision in relation to the others.\textsuperscript{210} Using this approach, the very existence of the third component of Section 15's mandate strongly suggests that schools will be involved in the latter, non-academic, therapeutic type of assessment. Section 15's third prong calls for the development of school procedures for responding to students with identified social and emotional problems.\textsuperscript{211} If the separate components of section 15 are read together as an integrated scheme, then it is most logical to conclude that the purpose of the assessment requirement is to identify those students to whom the response mandated by the third requirement will apply.

\begin{footnotesize}
\begin{enumerate}
\item be culturally skewed) available at \url{http://www.isbe.net/news/2004/newsclips/040813.htm#kid} (last visited Aug. 5, 2005).
\item \textit{See} \textit{Brown v. Hot, Sexy and Safer Prods.}, 68 F.3d 525 (1st Cir. 1995).
\item \textit{Id.} at 534.
\item \textit{Leebaert v. Harrington}, 332 F.3d 134 (2d Cir. 2002).
\item \textit{Children's Mental Health Act of 2003}, 405 ILL. COMP. STAT. 49/15(b) (2003).
\item \textit{Lulay v. Lulay}, 739 N.E.2d 521, 527 (Ill. 2000).
\item \textit{Children's Mental Health Act of 2003}, 405 ILL. COMP. STAT. 49/15(b) (2003).
\end{enumerate}
\end{footnotesize}
While the statutory language calling for "assessing social and emotional skills" might conceivably refer to the assessment of mere knowledge rather than personal development, such an interpretation seems strange in light of the mandated protocols for school response. Indeed, the standards developed by the Illinois State Board of Education, pursuant to the Children’s Mental Health Act, include not just purely academic goals, but behavioral goals as well. Goal Three, for example, concerns responsible behaviors in the school and community contexts. To satisfactorily reach this goal, students at the early high school level are expected to "evaluate how social norms and the expectations of authority influence personal decisions and actions" (a clearly academic exercise) and also to "demonstrate personal responsibility in making ethical decisions" (an evaluation of conduct). Similarly, early elementary school children are not only expected to be able to identify the types of decisions students make at school, but also to "make positive choices when interacting with classmates."

Given this interpretation, this portion of Section 15 of the Children’s Mental Health Act of 2003, calling for assessments of a student’s emotional and social development, has a decidedly non-curricular tenor. By characterizing the purpose of the assessments as something more than educative, it becomes possible to remove the constitutional analysis from that cluster of cases—categorically relegated to mere rational basis review—involving purely educational school policies. However, even where such extra-curricular school programs are concerned, three levels of judicial scrutiny are still possible options in the post-Troxel environment: rational basis review, strict scrutiny, and the intermediate Seventh Circuit approach of Doe v. Heck. Rational basis review is nearly always the death knell for constitutional challenges as the overwhelming majority of statutes are upheld under this lax standard, while strict scrutiny deemed
"'strict' in theory and fatal in fact"\textsuperscript{220} spells the almost certain downfall of the challenged law.\textsuperscript{221} Whether the parental interest in guiding a child's emotional health without state interference is more readily analogized to claims that have been deemed worthy of strict scrutiny or to those destined for rational basis review is therefore of paramount importance to the likelihood of vindication.

After \textit{Troxel}, school uniform policies, though not curricular, have merited only rational basis review.\textsuperscript{222} It is difficult to imagine, though, that a parent's desire to guide the emotional and social development of a child could be viewed by courts as analogous to the arguably trivial parental desire to encourage independent choice of clothing. The consequences of permitting the school to make preliminary determinations of emotional health are enormous by comparison. Standards for emotional health are necessarily social constructs\textsuperscript{223} which some parents may not share with the State. Furthermore, the stigma that attaches to a determination of mental illness is so great\textsuperscript{224} that parents may wish either to avoid subjecting a child to majority notions of mental health\textsuperscript{225} or may prefer to keep information about potential emotional problems out of the hands of the state altogether.\textsuperscript{226}

Unlike the stable and universally accepted standards for routine in-school vision screening and hearing tests, standards for what constitutes emotional health are fluid and hotly debated. The most dramatic example of the rapidly changing and still widely contested characterization of optimal emotional health concerns homosexuality.\textsuperscript{227} Just thirty years ago, the American Psychiatric Association included homosexuality as a category of mental illness,\textsuperscript{228} while today the Association, in keeping with

\textsuperscript{220} Id.
\textsuperscript{221} See id.
\textsuperscript{223} Wen-Shing Tseng, M.D., \textit{Overview: Culture and Psychopathology}, in \textsc{Culture and Psychopathology: A Guide To Clinical Assessment} 1, 9 (Wen-Shing Tseng, M.D. & Jon Streltzer, M.D. eds., 1997).
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{228} Id.
changes in societal attitudes, no longer views homosexuality as a pathology. Just as some parents in the 1970’s may have been sufficiently progressive in their views of sexual identity to spare their homosexual adolescents the indignity of enduring the label of mental illness, there may be other contemporary notions of emotional disturbance held by the majority that, in the eyes of some parents, are well within the continuum of emotional health. If the state is permitted to make a preliminary assessment of a child’s emotional health, it has usurped the parents’ right to subscribe to that definition of mental health that best suits their cultural and religious conceptions of emotional well-being.

Moreover, even for parents who are in full agreement with the State’s definition of emotional wellness, the stigma attached to designations (or even mere intimations) of emotional illness is reason enough for parents to prefer to deal with a child’s emotional development without the involvement of the state-run school. In a society in which the stigma of mental illness has historically resulted in limitations on employment and housing a parent might reasonably anticipate that an affirmative indication of emotional illness in a school screening might lead to diminished educational or extra-curricular opportunities at school. In one scholarly study concerning prevailing societal attitudes towards the mentally ill, respondents indicated that they viewed the emotionally ill as dangerous and inherently less capable of managing their affairs. It is surely to be expected that some parents might prefer to spare a child coping with emotional problems from the added injury of being perceived by teachers and school administrators in this light.

The parental interest in managing a child’s emotional health without interference from the State takes on even greater weight given the variety of attitudes toward mental illness among America’s many ethnic, racial and religious minorities. For a number of ethnic minorities, the burden of undergoing a government-mandated emotional health assessment may be exceptionally onerous because of culturally determined sensitivities to questions of mental illness. In general, Hispanics and Asian Americans attach a comparatively stronger stigma to mental illness. One study

229. Id.
231. United States Dept. of Health and Human Services, Office of the Surgeon General, supra note 224.
232. Id.
233. See generally id.
234. Id.
indicates, for example, that only twelve percent of the Asian Americans interviewed felt comfortable sharing an emotional health concern with a friend. 235  

Asians, as a group, are typically uncomfortable sharing information about emotional problems, and function under a culturally-determined belief that it is inappropriate to discuss emotional problems outside the family. 236  Furthermore, the kind of personal questions that are commonly part of such assessments are anathema to many Asian cultures in which it is inappropriate to express an opinion about oneself compared to others. 237  Indeed, in Asian cultures, a diagnosis of mental illness is thought to reflect so poorly on the family that it is perceived that the prospects for marriage and economic opportunity of all family members will be adversely affected. 238  

It is not uncommon for immigrant and refugee populations, having recently escaped oppressive political regimes, to have a profound fear of any type of governmental intrusion into their private lives. 239  For these populations, in-school emotional health assessments could be particularly onerous.  

Moreover, because no culturally unbiased assessment tool is possible, 240  it is inevitable that some ethnic and cultural groups will more frequently come up short as a result of culturally biased assessment standards. 241  Appropriate and healthy behaviors are culturally determined, resulting in profound variations in the manner in which emotional illness presents itself from culture to culture. 242  An understanding of cultural

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235.  "Id."  
237.  "Id. at 35-36."  
240.  PANIAGUA, supra note 236, at 36.  
241.  See H.B.M. Murphy, Handling the Cultural Dimension in Psychiatric Research, in CULTURE AND PSYCHOPATHOLOGY 113, 121 (Juan E. Mezzich & Carlos E. Berganza eds., 1984).  
242.  Wen-Shing Tseng, M.D. & Jon Streltzer, M.D., Integration and Conclusions, in CULTURE AND PSYCHOPATHOLOGY: A GUIDE TO CLINICAL ASSESSMENT 241, 244-45 (Wen-Shing Tseng, M.D. & Jon Streltzer, M.D. eds., 1997).
differences is central to proper assessments.\textsuperscript{243} In Filipino culture, for example, losing face—a thoroughly foreign concept to most Americans—may be the cause of a social withdrawal that in Western culture would be interpreted as a sign of a biologically-based mental disturbance.\textsuperscript{244} In American schools that increasingly value gender equality, it is easily conceivable that Hispanic notions of machismo\textsuperscript{245} and marianismo\textsuperscript{246} might register as developmental aberrations.\textsuperscript{247}

Religious differences present yet another minefield for faulty assessments.\textsuperscript{248} Religion plays a significant role in defining appropriate social behavior and gender roles.\textsuperscript{249} In largely protestant America, some Hispanic Catholic children may entertain beliefs that would seem positively delusional to one unfamiliar with Catholic culture.\textsuperscript{250} Some minority religious rituals are susceptible to misinterpretation in the United States, even by a sophisticated and trained psychologist, as compulsions or phobias.\textsuperscript{251} When an orthodox Muslim male student assiduously avoids physical contact with fellow female students, according to the dictates of his religion, an outsider, unschooled in the mores of Islamic culture, might mistakenly find a social anxiety disorder.\textsuperscript{252} Similar misunderstandings can result from an outsider’s observance of an orthodox Jew or orthodox Muslim’s fastidious adherence to the dietary restrictions placed upon them by their religious convictions.\textsuperscript{253} The painstaking attention to cleanliness required by religious dietary laws could easily strike an unsuspecting Anglo-American as indications of an obsessive-compulsive disorder.\textsuperscript{254}

\textsuperscript{245.} The term machismo denotes the Hispanic gender role that requires the male to act as the head of the household. Panagia, supra note 236, at 5.
\textsuperscript{246.} Marianismo is the cultural phenomenon according to which obedience, timidity and dependence are considered positive personality traits for women. Id. at 5-6.
\textsuperscript{247.} Id. at 14.
\textsuperscript{249.} Id.
\textsuperscript{250.} Panagia, supra note 236, at 7.
\textsuperscript{251.} Bernstein, supra note 248, at 58.
\textsuperscript{252.} Id.
\textsuperscript{253.} See id. at 59.
\textsuperscript{254.} See id.
The shifting nature of any standard of emotional health, the necessarily culturally biased (and therefore faulty) tools that are available for making assessments, and the profound stigma that attaches to even the hint of emotional illness all must be considered when deciding whether a parent’s interest in guiding the emotional development of a child is any more deserving of constitutional protection than the unsuccessfully asserted parental interest in encouraging free choice of school clothing. In terms of what is at stake for parents and their children, the potential consequences of in-school emotional assessments find an analogy more readily with cases addressing similarly invasive school programs rather than with school uniform policies.

The emotional health testing proposed by the Illinois legislature, as well as the concerns raised by such in-school tests, find more apt parallels in the *Merriken* case decided favorably for parental rights in the 1970s.255 *Merriken* also involved a well-intentioned, but highly intrusive, assessment designed to identify and benefit troubled students.256 Indeed, the test administered in *Merriken* was a particular form of psychological assessment, aimed at identifying potentially addictive personalities.257 Questions about the potential uses of the information gleaned from the tested students in *Merriken*258 present themselves with equal force under the Illinois statute. Indeed, all of the *Merriken* Court’s concerns about the potential psychological ramifications for positively identified students apply to students singled out by emotional health assessments in Illinois. The self-fulfilling prophecy feared by the *Merriken* Court, as well as the potential for ridicule and derision at school259 also resonate in the context of in-school emotional health assessments in Illinois. Finally, the *Merriken* court’s conclusion that even children who opted out of the testing might be viewed with suspicion by classmates ought to be considered when determining whether the inclusion of an opt-out provision (available to either the child or the parent) is sufficient to support a judicial conclusion that state-mandated testing does not implicate the right to parental autonomy.260

At first glance, the post-*Troxel* cases of *Fields v. Palmdale School District* and *C.N. v. Ridgewood Board of Education* might appear to speak to the issues presented by emotional health assessments. The school

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256. *Id.* at 914.
257. *Id.*
258. *Id.* at 919.
259. *Id.* at 915.
260. *Id.*
actions in both of these cases involved soliciting sensitive information from students, and yet both cases avoided close judicial scrutiny. However, in the *Ridgewood* case, the information gathered in the questionnaires was anonymously provided, and could have no negative impact on participating students. In *Fields*, the survey was also intended to provide information about the community as a whole, and not about individual students.

Furthermore, the parents’ complaint in *Fields* focused on the information the testing exposed their children to, not the coerced revelation of private family matters.

If a parental rights challenge can evade rational basis review by emphasizing the unavoidably invasive quality of emotional assessments in contrast to the minimally intrusive nature of the policies that courts have been content to examine under the lax rational basis standard, then two variants of heightened scrutiny remain: courts might either apply the traditional strict scrutiny analysis (as the Seventh Circuit did in *Lulay*) or the balancing test laid out in *Doe v. Heck*.

Under the two-part strict scrutiny test, school-based emotional health assessments could only pass constitutional muster by showing that the state has a compelling interest in the healthy emotional and social development of America’s children, and then by proving that in-school assessments are narrowly tailored to achieve that goal. Courts have recognized the prevention of AIDS and other sexually transmitted diseases as a genuinely compelling state interest, and it seems most likely that American courts would likewise recognize the state’s interest in promoting the emotional health of its children.

The question of narrow tailoring is frequently framed as follows: Does the administration of in-school emotional assessments achieve the ends legitimately sought by the state in the manner least restrictive of a parent’s right to childrearing control and family privacy? Advocates of parents’ rights can mount a formidable argument that it does not: the Illinois Children’s Mental Health Partnership, the entity responsible for drawing up the preliminary plan for the implementation of the statutory goals of the Children’s Mental Health Act of 2003, proposes, of its own accord, a

263. *Id.* at 1222.
265. *Doe*, 327 F.3d at 520.
266. *Lulay*, 739 N.E.2d at 529.
268. *See id.*
substantially less restrictive means of achieving the state’s goal. The preliminary plan, submitted to Governor Blagojevich in September of 2004, calls for the incorporation of mental health evaluations in the routine physical examinations already required of Illinois school children prior to kindergarten, fourth, and ninth grades. By incorporating the assessments into physical examinations, parents could exercise greater control by choosing a physician, perhaps one familiar with the cultural, religious and class affiliations of the family. If necessary, parents would be free to seek a second opinion. Furthermore, parents and students could decide for themselves whether to share the doctor’s conclusions about the student’s emotional development with the school or to address the problems without school involvement. While protecting the familial privacy of Illinois parents and children, these evaluations—privately and professionally conducted—could satisfy the state’s interest in assuring that Illinois children have a clean bill of emotional health. This is the less restrictive alternative (already approved by the state) that could be used to defeat the constitutionality of in-school assessments under strict scrutiny.

In the alternative, if, as some commentators argue, *Troxel* constitutes an implicit rejection of strict scrutiny in favor of a new balancing test for family privacy cases, then the test created by the Seventh Circuit in *Doe v. Heck* affords an appropriate model. If this model were used, parents seeking to challenge in-school emotional health assessments would need to convince a court that the balance of the four factors dictated by *Heck* weigh in favor of protecting the parent’s liberty interest. The first prong of the balancing test, the nature of the interest at stake, ought to work in favor of the parents. The Supreme Court has recognized a constitutional right to reject medical treatment, suggesting that the Court holds autonomous decision-making in the realm of health in high regard. In order to make the second prong—the nature of the intrusion—weigh in their favor, parents could use the arguments from *Merriken* that students, being at an impressionable age, could fall victim to self-fulfilling prophecies when positively identified as at risk in emotional assessments. The third


271. *Heck*, 327 F.3d at 520.

272. *See id.*


prong, the urgency of the state interest, could arguably weigh in favor of constitutionality, given that government studies indicate that mental illness strikes one in ten children. Finally, using this comment’s discussion of the inevitably imperfect assessment tools available, it can be credibly argued that the effectiveness of the means chosen—the fourth prong—is low. Three of the four prongs weigh in favor of recognizing the superiority of the parental interest over the state.

VI. CONCLUSION

Mental illness is real, and it afflicts children as readily as adults. While the State undoubtedly has an interest in promoting the healthy social and emotional development of its children, parents have a countervailing interest in making a private and personal determination with their children about what constitutes good emotional health and how much information the family would like to share with the school. The right to autonomous parenting is an integral part of the historical traditions of American culture, enshrined in the Due Process Clause of the Fourteenth Amendment nearly a century ago, and reaffirmed by Troxel v. Granville in the 2000 term. Although there is certainly no agreement, even post-Troxel, that state statutes bearing on all parental rights should be subjected to heightened scrutiny, the Supreme Court has left the door open, and lower courts are not barred from employing heightened scrutiny for school policies that go beyond teaching and touch upon sensitive and personal issues. The emotional development of children is a highly sensitive concern of parents, and when legislators begin to insinuate themselves into this private area, courts should demand more than a mere rational basis justification.

"The child is not the mere creature of the State" observed the Supreme Court in Pierce v. Society of Sisters. Yet a historical overview of the struggle between parents and schools for authority over children suggests that parents have lost considerable ground, and children have become creatures of the state to a degree previously unimaginable. According to conventional parenting wisdom, children must be given responsibility in

276. See id.
278. Troxel, 530 U.S. 57.
order to learn to accept accountability for their actions. Similarly, a society that values responsible parenting should take a stand against the insidious shifting of parental responsibilities to the State.

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