

HUMANE EDUCATION, DISSECTION, AND THE LAW

By
Marcia Goodman Kramer*

Students regularly encounter animal dissection in education, yet humane education receives little attention in animal law. This article analyzes the status of humane education laws in the United States. It discusses the range of statutory protections, from student choice laws to bans on vivisection. The article then analyzes the litigation options for students who do not wish to dissect, including constitutional claims and claims arising under student choice laws. The article concludes by calling for additional legislation to protect students who have ethical objections to dissection.

I. INTRODUCTION	281
II. OVERVIEW OF HUMANE EDUCATION LAWS	282
A. <i>Kindness to Animals</i>	282
B. <i>Vivisection: Experiments on Live Animals</i>	283
C. <i>Dissection: Animals Killed for Educational Use</i>	284
III. CASE LAW SCENARIO	287
IV. CONSTITUTIONAL BASIS FOR ABSTENTION FROM DISSECTION	288
V. HISTORY OF LITIGATION ON EDUCATION ISSUES	288
VI. OPPOSITION TO DISSECTION LITIGATED	292
VII. APPLICABILITY TO FUTURE CHALLENGES	294
A. <i>Model for Litigation: The Graham Case</i>	295
B. <i>Settlements in Related Cases</i>	296
VIII. CONCLUSION	298

I. INTRODUCTION

In examining the current field of animal law, few practitioners—and only some animal advocates—include issues in education, even humane education, as an element for consideration in their discussion of how animals are used and abused in our society. Litigation in this area is limited and a relatively small number of animals are used for

* © Marcia Goodman Kramer 2007. Marcia Kramer is the director of legal and legislative programs for the National Anti-Vivisection Society (NAVS), based in Chicago, Illinois, where she has worked since 1995. She received her J.D. from DePaul University in Chicago in 1987 and worked as an editor for Commerce Clearing House, Inc., on Nuclear Regulation Reports and Utilities Law Reports. The author wishes to acknowledge NAVS' paralegal, Julie Ireland, and legal research assistants, Mary Ellen Barrett and Beth Heffernan, for their help in assuring the accuracy of current case law for this article.

vivisection or dissection in schools in comparison with the number of animals used for agricultural purposes or in research.

Yet education falls squarely into the latter categorization of research, as students are exposed to life science education that involves the death of living creatures. It is arguable that all research on animals begins in the classroom, from the first earthworm or frog in elementary or middle school to fetal pigs and cats in secondary education. Advanced education in the life sciences begins where high school ends and may continue right up through the laboratory doors with internships and fellowship opportunities through graduate school.

What protection has the law provided to students with ethical objections to dissection in middle and high school, as well as at the college level? This article will discuss generally the state of the law regarding dissection, as well as look at case law remedies that are arguably available for students who object to participating in or watching a dissection as part of the educational experience. The aim of this article is to provide effective strategies for enforcement of an individual's moral stance regarding the harming of animals in the name of education.

II. OVERVIEW OF HUMANE EDUCATION LAWS

While there is little litigation involving humane education issues, a number of state laws have been passed directing schools to take into account ethical objections from students and/or their parents in enforcing participation in one element of the curriculum.¹ This issue has social implications for the humane treatment of animals and also affects religious and moral freedoms guaranteed by the First Amendment of the United States Constitution.

A. *Kindness to Animals*

The issue of humane education generally has been subject to a fair number of legislative endeavors over the past few years. Some states have long incorporated humane standards in their educational curriculum² and others are only now considering the notion that "[t]he greatness of a nation and its moral progress can be judged by the way its animals are treated."³

¹ See generally *e.g.* Cal. Educ. Code Ann. §§ 32255.1, 32255.3-32255.6 (West 2002) (allowing students to be excused from classroom dissection).

² See generally *e.g.* La. Stat. Ann. § 17:266 (2006) (1916 Act directing the state board of education to take steps to provide for the teaching of kindness to dumb animals).

³ *The Extended Circle: A Commonplace Book of Animal Rights* 91 (Jon Wynne-Tyson comp., 1st Am. Ed., Paragon H. 1989) (quoting Mohandas Karamchand Gandhi).

Five states—California,⁴ Illinois,⁵ Louisiana,⁶ New York,⁷ and Washington⁸—currently require instruction in the worth of all living things or the humane treatment of animals. By 2005, four states—Connecticut,⁹ New Jersey,¹⁰ New York,¹¹ and Virginia¹²—had proposed revisions to their education laws that included the “humane treatment of animals”¹³ or “kindness toward domestic pets,”¹⁴ along with an array of other ethical concerns, such as racial tolerance and concern for the environment.¹⁵ As schools look at their codes of conduct and the social messages they feel are appropriate to emphasize in their curriculums, consideration for animals definitely has a place.

B. *Vivisection: Experiments on Live Animals*

More specifically, a few states prohibit vivisection on animals in schools. Vivisection differs from dissection in that the animal is alive during any procedure practiced upon it.¹⁶ States that prohibit or restrict experiments on live animals in their schools include Florida,¹⁷ Massachusetts,¹⁸ Maine,¹⁹ and New York.²⁰ Such prohibitions become an issue when students, as part of a science fair project, perform inva-

⁴ Cal. Educ. Code Ann. § 51540 (West 2006).

⁵ 105 Ill. Comp. Stat. Ann. 5/27-13.1 (West 2006).

⁶ La. Stat. Ann. § 17:266.

⁷ N.Y. Educ. Law § 809 (McKinney 2000).

⁸ Wash. Rev. Code Ann. § 28A.230.020 (West 2006).

⁹ Conn. H. 5443, 2006 Gen. Assembly, Feb. Sess. 1 (Feb. 2006).

¹⁰ N.J. Assembly 4023, 2004-2005 Reg. Sess. 2 (May 5, 2005).

¹¹ N.Y. Sen. 1233, 228th Reg. Sess. § 1 (Jan. 26, 2005) (available at WL, ST-BILLTXT database).

¹² Va. H. 209, 2006 Sess. (Feb. 8, 2006) (bill tabled in rules) (available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061=sum+HJ209>).

¹³ *Id.*

¹⁴ N.Y. Sen. 1233, 228th Reg. Sess. at § 1.

¹⁵ See *e.g. id.* at § 1 (requiring “sensitivity training regarding diversity of race, ethnicity, and religion”); Conn. H. 5443, 2006 Gen. Assembly, Feb. Sess. at 1 (suggesting curriculum topics include Native American, African American, and Puerto Rican American history, as well as Holocaust awareness).

¹⁶ *Webster’s Third New International Dictionary* 656, 2560 (Philip Babcock Gove, Ed., Merriam-Webster Inc. 1986).

¹⁷ Fla. Stat. Ann. § 1003.47 (West 2004 & Supp. 2007) (Section 1003.47(1)(a) bans vivisections on living mammalian vertebrates and birds. 1003.47(1)(c) allows biological experiments not resulting in physiological harm on non-mammalian vertebrates, but not birds.).

¹⁸ Mass. Gen. Laws Ann. ch. 272, § 80G (West 2000) (No live vertebrate may be used “as part of a scientific experiment or for any other purpose in which said vertebrates are experimentally medicated or drugged in a manner to cause painful reactions or to induce painful or lethal pathological conditions, or in which said vertebrates are injured through any other type of treatment, experiment, or procedure including but not limited to anesthetization or electric shock, or where the normal health of said animal is interfered with or where pain or distress is caused.”).

¹⁹ 7 Me. Rev. Stat. Ann. § 3971(1) (2002) (prohibiting vivisection for all school activities).

²⁰ N.Y. Educ. Law § 809(5)(a)–(b) (prohibiting “the performance of a lesson or experimental study on a live vertebrate animal in any such school or during any activity

sive procedures on live animals. New York has a system of waivers available for experiments done in a laboratory for the purpose of a science fair,²¹ but only three waivers have been filed, and none of them were approved,²² despite a number of invasive projects documented over the years at the Intel International Science and Engineering Fair.²³ Most often, students perform invasive experiments on live animals within the confines of a research laboratory under the auspices of a supervising scientist; thus, the fact that vivisection is prohibited for school projects by state law is largely ignored. Some science fair rules, while not actively promoting animal experimentation, are certainly written with an understanding that these projects will take place.²⁴ And some science fair administrators are unwilling to require that projects comply with the law of their originating states.

Monitors of science fair activities, including the National Anti-Vivisection Society (NAVS), are reluctant to demand enforcement of these provisions when the violations are discovered, because the impact will land solely on the students at a time and place when they are celebrating their advancement in the sciences.²⁵ It is the school officials and mentors who should be held responsible for ensuring that high school students know what rules apply to their projects, and science fair monitors' efforts to work with the states have resulted in little cooperation.

C. *Dissection: Animals Killed for Educational Use*

A third type of humane education law impacts the use of animals in classrooms for grades K-12 by addressing the concerns of students who have an ethical objection to performing a dissection exercise on animals as part of their science curriculum. These laws, commonly known as "student choice" laws, have been passed in nine states, and hundreds of school districts and boards have policies that similarly provide students with a choice not to dissect.²⁶

To dissect or not to dissect is a matter that can consume the attention of middle school, high school, and even college students throughout their academic careers, whether or not the student has an interest

conducted under the auspices of such school whether or not the activity takes place on the premises," but permitting waivers to this policy).

²¹ *Id.* at § 809(5)(b).

²² Annual Rpt. from Richard P. Mills, Commr. of Educ., N.Y. St. Educ. Dept., to Gov. & Legis., *Instruction in the Humane Treatment of Animals Annual* (Jan. 1, 2003–Dec. 1, 2003) (copy on file with *Animal L.*).

²³ Humane Socy. N.Y., *Legislative Alert*, <http://www.humanesocietyny.org/legislation.shtml#humaneeducation> (accessed Apr. 8, 2007).

²⁴ See e.g. Fla. St. Sci. & Engr. Fair, *2007 SSEF Mortality Report*, <http://www.floridassef.net/forms/2007forms/2007SSEFmortalityreport.pdf> (accessed Apr. 14, 2007) (requiring entrants to report all use of vertebrate animals, including resulting deaths).

²⁵ Based on the Author's experience through her employment at NAVS (author's statement available on file with *Animal L.*).

²⁶ See generally e.g. Cal. Educ. Code Ann. §§ 32255.1, 32255.3–32255.6 (allowing students from grades K-12 to be excused from classroom dissection).

in studying biology, zoology, or one of the health sciences as a major or career choice. With science a requirement for graduation in many high schools and dissection a mandatory exercise in some science classes in grade school, the question of whether or not to participate in dissection affects millions of students nationwide.

For many students this is not a concern. Not all schools participate in dissection activities and over the years many schools have developed policies to exempt students who object to this exercise.²⁷ Also, a vast number of students take no stand on the matter, but accept—and possibly anticipate—the dissection unit of their life science courses. Without a state dissection choice law, schools in many states may still require animal dissection as part of their curriculum without providing an alternative. New Jersey was the most recent state to adopt a law requiring schools to accommodate students stating an objection to dissection.²⁸ Bills were considered in the 2005–2006 legislative sessions for Michigan²⁹ and Massachusetts.³⁰

Why is the subject of dissection important in the field of animal law? Any debate on the subject has as much to do with the sensibilities of animal advocates as the animals themselves. While animals commonly used for dissection range from fish, earthworms, and frogs to fetal pigs and even cats,³¹ the law regarding dissection does not address the harm done to the animals or the ecosystem in collecting these animals. The law does not address the role of animal shelters that sell euthanized animals to biological supply houses—often on a demand basis that may conflict with a chartered mission to adopt out as many animals as possible.

The law instead focuses on the ability of students to receive a quality science education without having to choose between their grades and their ethical beliefs. The policy implications of this accommodation are overwhelming. Science—even biology—can be taught without harming animals.³² It is a simple concept, but one that can be extrapolated into more advanced scientific studies, where students choose to engage in biomedical testing or even drug development, using nonanimal methodologies to study human responses. Student choice opens up the door to a new generation of scientists who, from

²⁷ *Id.*

²⁸ N.J. Stat. Ann. § 18A:35-4.25 (West 2006) (codified from New Jersey bills A2233 and S1739.0).

²⁹ Mich. H. 4254, 2005-2006 Sess. (Feb. 10, 2005) (available at <http://legislature.mi.gov/doc.aspx?2005-HB-4254>).

³⁰ Mass. Legis., *House, No. 1252*, <http://www.mass.gov/legis/184history/h01252.htm> (accessed Apr. 14, 2007) (reporting that Mass. House Bill No. 1252 was referred to the Committee on House Ways and Means on March 8, 2006).

³¹ Natl. Anti-Vivisection Socy., *Animals in Education*, http://www.navs.org/site/PageServer?pagename=ain_edu_education_main (accessed Apr. 8, 2007).

³² Jonathan Balcombe & Allison George, *Beyond Frogs and Formaldehyde*, 15 *Good Medicine* (Spring 2006) (available at http://www.pcrm.org/magazine/gm06spring/beyond_frogs.html).

their earliest leanings, approach science as an intrinsically humane process that neither wastes nor abuses animal life.

So what is the law—both statutory and case law—supporting a student's right not to dissect? On the statutory basis, nine states—California,³³ Florida,³⁴ Illinois,³⁵ New Jersey,³⁶ New York,³⁷ Oregon,³⁸ Pennsylvania,³⁹ Rhode Island,⁴⁰ and Virginia⁴¹—have student choice laws. These laws range from basic accommodation provisions to parental notification to specific class exemptions.⁴² All apply only to students through grade twelve,⁴³ and some apply only to public school students.⁴⁴

Many individual schools and school boards have also developed policies that require teachers to accommodate students with ethical or moral objections to dissecting animals.⁴⁵ A majority of county boards in the state of Maryland have adopted a provision for accommodation,⁴⁶ and Clark County, Nevada (which includes the city of Las Vegas) passed a school board policy as a result of a student's protest.⁴⁷

Even at the level of advanced education, individual institutions have developed policies to accommodate students' objections, especially regarding terminal animal labs.⁴⁸ The "dog labs" once required by medical schools have been revised or replaced with nonterminal laboratory work—using sophisticated alternatives or even human cadavers—in a number of prestigious universities, including Emory,

³³ Cal. Educ. Code Ann. §§ 32255.1–32255.6.

³⁴ Fla. Stat. § 1003.47.

³⁵ 105 Ill. Comp. Stat. Ann. 112/15 (West 2006).

³⁶ N.J. Stat. Ann. § 18A:35-4.25.

³⁷ N.Y. Educ. Law § 809(4).

³⁸ Or. Rev. Stat. § 337.300 (2005).

³⁹ 24 Pa. Consol. Stat. Ann. § 15-1523 (West 2006).

⁴⁰ R.I. Gen. Laws § 16-22-20 (2001).

⁴¹ Va. Code Ann. § 22.1-200.01 (West 2004).

⁴² See generally 105 Ill. Comp. Stat. Ann. § 5/27-14 (basic accommodation); N.J. Stat. Ann. § 18A:35-4.25 (parental notification); Fla. Stat. Ann. § 1003.47 (class exemption).

⁴³ See generally Or. Rev. Stat. § 337.300 (applies to students through grade twelve); 24 Pa. Consol. Stat. Ann. § 15-1523 (applies to students through grade twelve).

⁴⁴ Cal. Educ. Code Ann. §§ 32255.1–32255.6; Fla. Stat. Ann. § 1003.47; N.J. Stat. Ann. § 18A:35-4.25; N.Y. Educ. Law § 809; Or. Rev. Stat. Ann. § 337.300; Va. Code Ann. § 22.1-200.01 (California, Florida, New Jersey, New York, Oregon, and Virginia statutes only apply to students in public schools.).

⁴⁵ HSUS, *Dissection Laws*, http://www.hsus.org/animals_in_research/animals_in_education/dissection_laws.html (last updated Aug. 30, 2006).

⁴⁶ *Id.*

⁴⁷ Clark Co. Sch. Dist. Reg. (Nev.) 6144 (Apr. 11, 2002); HSUS, *Students Slice through School Dissection Requirements*, http://www.hsus.org/animals_in_research/animals_in_education/students_slice_through_school_dissection_requirements.html (accessed Apr. 14, 2007).

⁴⁸ A terminal animal lab is one that results in the death of the animal, either as a result of the experiment itself or through euthanasia after completion of the experiment or lab. Animals may be euthanized because of the harmful nature of the procedures performed or because the school chooses this option in dealing with a specimen who would otherwise need extensive veterinary care in order to affect a full recovery.

Harvard, Tufts, Yale, and dozens of other medical schools.⁴⁹ But what options are open to students whose ethical objections are not accommodated at their schools? Once appeals to the principal, superintendent, or dean are exhausted, is there a remedy available to these students through the courts?

III. CASE LAW SCENARIO

Before looking at specific case law that may or may not support a legal remedy, it is helpful to look at a hypothetical case where a legal remedy is needed. This scenario is typical of situations that are brought to the attention of NAVS' Dissection Hotline. The Dissection Hotline, a toll-free number that offers counseling to students who are faced with dissection in the classroom, offers most students assistance that results in a non-litigious solution to their problem.⁵⁰ The scenario generally goes something like this:

Jane Doe is taking a biology class in a high school in Iowa. She is notified a week ahead of time that students will be performing dissection on frogs in their classroom. Students who do not wish to participate may abstain, but they must watch the dissection and will be tested on the dissected specimens at the end of the unit. Jane does not want to dissect or watch a dissection. She is a vegetarian who volunteers for an animal shelter on the weekends. She approaches her teacher, who says that the dissection unit is necessary to the biology class. If Jane misses the classes, she will receive a failing grade for that unit. Alternatively, Jane can drop biology, but she may receive a penalty for late withdrawal.

Jane has a strong and deep-seated belief in the sanctity of life and feels that it is unnecessary to kill an animal—or study an animal who was killed—to meet the requirements of the class. She proposes the use of a model frog or a computer dissection program on frog anatomy instead, but her teacher refuses to allow her to use either alternative. Jane takes her proposal through the channels of the school administration without success. Meanwhile, the dissection unit has begun and she has skipped these classes.

Jane's parents support her actions. She chooses to bring suit against the school for violation of her First Amendment rights, for failure to provide or allow the use of an alternative to the dissection of an animal and for denying her the right to pursue a course of study at the school without violating her ethical beliefs.⁵¹ Does Jane have a First Amendment basis for claiming that she should not have to dissect?

⁴⁹ PCRM, *Ethics in Medical Education: Medical School Curricula with No Live Animal Laboratories*, http://www.pcrm.org/resch/meded/ethics_med_list.html (accessed Apr. 14, 2007).

⁵⁰ NAVS, *Animals in Education: NAVS Dissection Hotline*, http://www.navs.org/site/PageServer?pagename=ain_edu_dissection_hotline (accessed Apr. 14, 2007) [hereinafter *Dissection Hotline*].

⁵¹ U.S. Const. amend. I.

IV. CONSTITUTIONAL BASIS FOR ABSTENTION FROM DISSECTION

There are certainly grounds for arguing that individuals whose objection to dissection is based on a religious or moral stance that it is wrong to harm animals have a free exercise claim under the United States Constitution. The Constitution's First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁵² In addition to claims under the Free Exercise Clause, the Due Process Clause of the Fifth Amendment has been invoked to assert the right of parents to make determinations regarding their children's education.⁵³ "No person shall . . . be deprived of life, liberty, or property, without due process of law."⁵⁴ The Due Process Clause applies to the states under the provisions of the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁵

V. HISTORY OF LITIGATION ON EDUCATION ISSUES

Chronologically, the case of *Pierce v. Society of Sisters* first challenged Oregon's compulsory education law requiring parents and guardians of children ages eight through sixteen to send their children to public school.⁵⁶ The claimants contended that the enactment of this law "conflict[ed] with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, [and] the right of schools and teachers therein to engage in a useful business"⁵⁷ The Supreme Court upheld a lower court decision barring enforcement of this Act, stating:

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁵⁸

Although the challenge to the constitutionality of the statute was brought by privately run schools claiming that their business interests in providing education were being harmed by this provision, the

⁵² *Id.* (emphasis added).

⁵³ *Pierce v. Socy. of Sisters*, 268 U.S. 510, 532 (1925).

⁵⁴ U.S. Const. amend. V.

⁵⁵ *Id.* at amend. XIV, § 1.

⁵⁶ 268 U.S. at 530.

⁵⁷ *Id.* at 532.

⁵⁸ *Id.* at 534-35.

Court's ruling recognizes the parents' constitutional Due Process rights with regard to the education of their children.⁵⁹

In formulating an argument that an act of the government prohibits the free exercise of one's religion, we traditionally look at the standard applied in *Sherbert v. Verner*.⁶⁰ This case involved a denial of state employment security benefits to a member of the Seventh-Day Adventist Church who was fired from her job after she refused to work on Saturday, her Sabbath day of faith.⁶¹ The Court applied a test to determine whether an individual's right to religious free exercise has been violated by the government. Courts must first determine whether the person has a claim involving a sincere religious belief and whether the government action is a substantial burden on the person's ability to act on that belief.⁶² If those elements are established, according to the test set out in *Sherbert*, the government must prove that there is a compelling state interest and that it has pursued that interest in a manner that is the least restrictive, or least burdensome, to religion.⁶³

When it comes to forcing students to dissect in the classroom, two questions are involved: (1) whether there is "a sincere religious belief" at stake, and (2) whether the state is applying a "compelling state interest" in the least restrictive way.⁶⁴ Before addressing the specifics of how the courts have viewed these elements, it is worthwhile to discuss how they have viewed education issues generally, and then specifically, how they have applied the compelling state interest element of a claim.

In *Pierce*, the Supreme Court recognized the strong interest parents have in the upbringing of their children, an interest that was later upheld in *Wisconsin v. Yoder*.⁶⁵ In this seminal education case, Amish parents protested against a compulsory school attendance law that violated the Amish custom of educating their children only through the eighth grade.⁶⁶ The Court applied the test established in *Sherbert* and affirmed that additional deference was in order, because it was a hybrid case that combined free exercise with parental due process rights.⁶⁷ The hybrid nature of the claim added strength to the free exercise claim, because it was joined with an additional constitutional element.

More recently, the court in *Hicks v. Halifax County Board of Education*, a case regarding a school dress code, agreed with this approach

⁵⁹ *Id.* at 533-34.

⁶⁰ 374 U.S. 398, 409 (1963).

⁶¹ *Id.* at 399.

⁶² *Id.* at 403.

⁶³ *Id.*

⁶⁴ *Id.* at 403-07 (providing that South Carolina could not apply eligibility provisions for unemployment where such statute denied benefits to claimant who refused employment due to her religious beliefs).

⁶⁵ 268, U.S. at 518; 406 U.S. 205, 234 (1972).

⁶⁶ 406 U.S. at 209.

⁶⁷ *Id.* at 233.

by denying the school board's motion for summary judgment on one count that involved free exercise.⁶⁸

[W]here a parent's free exercise right may not be sufficient to justify an exemption from a neutral, generally applicable law, that right, when combined with the constitutional right of the individual, as a parent, to direct her child's upbringing may be sufficient. Whether or not the second constitutional interest is independently viable is not at issue. It is the mere presence of the interest, as a genuine claim, supported by evidence in the record, that triggers the heightened scrutiny of the free exercise claim.⁶⁹

If this standard were applied today, there would be no question that a compelling state interest would be needed to force a student to dissect in the classroom. However, the standard changed in 1990 in *Employment Division, Department of Human Resources of Oregon v. Smith*, which challenged the federal government's restriction on the use of peyote for a Native American religious ritual.⁷⁰ The Court found that "religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."⁷¹ The Court thereby set a much higher standard to challenge the restriction of the free exercise of religion. The dissent, however, argued that the burdens on free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means"⁷²

The *Employment Division* decision was superseded by the passage of the Religious Freedom Restoration Act of 1993 (RFRA).⁷³ The RFRA adopts the minority view that the government must have a compelling interest and that the federal government cannot substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.⁷⁴ The government must also show that the restriction on free exercise is the least restrictive means of furthering that compelling interest.⁷⁵

The RFRA's view was upheld in the recent federal case of *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, where the Supreme Court upheld the church's use of a ritual tea made from a hallucinogen regulated under Schedule I of the Controlled Substances Act.⁷⁶ The Court ruled that the RFRA's strict scrutiny test "require[d] the Government to demonstrate that the compelling interest test [was] satisfied through application of the challenged law 'to the person'—the

⁶⁸ 93 F. Supp. 2d 649, 650 (E.D.N.C. 1999).

⁶⁹ *Id.* at 662 (footnotes omitted).

⁷⁰ 494 U.S. 872, 874 (1990).

⁷¹ *Id.* at 886 n. 3.

⁷² *Id.* at 907 (Blackmun, Brennan & Marshall, JJ., dissenting).

⁷³ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

⁷⁴ *Id.* at § 2000bb-1(a).

⁷⁵ *Id.* at § 2000bb-1(b).

⁷⁶ 546 U.S. 418, 419 (2006).

particular claimant whose sincere exercise of religion is being substantially burdened."⁷⁷

However, the RFRA's application to the states was short-lived. In *City of Boerne v. Flores*, the Supreme Court declared that the RFRA was unconstitutional with regard to the states and that Congress had exceeded its enforcement power under Section Five of the Fourteenth Amendment.⁷⁸ Although Congress may certainly enact legislation enforcing the constitutional right to the free exercise of religion, the Court found that the "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."⁷⁹ As a result, the standard applied in *Employment Division* was affirmed, though the Court suggested—and several states have passed—a state version of the RFRA that does require the state government to apply a "compelling interest" and "least restrictive means" test to free exercise cases.⁸⁰

States that have already adopted a state version of the RFRA include Alabama,⁸¹ Arizona,⁸² Connecticut,⁸³ Florida,⁸⁴ Idaho,⁸⁵ Illinois,⁸⁶ Missouri,⁸⁷ New Mexico,⁸⁸ Oklahoma,⁸⁹ Pennsylvania,⁹⁰ Rhode Island,⁹¹ South Carolina,⁹² and Texas.⁹³ For a challenge in one of the states listed above, a suit can be filed in state court alleging a violation of religious rights. Under the standard applied by the RFRA, the state institution—the school—must meet both the compelling interest and least restrictive means tests set out in *Sherbert*. In this circumstance, the plaintiff would most likely prevail.

However, the RFRA standard of review is applied only to those states that have passed their own version of this legislation. As such, it is necessary to look at another line of cases that reinforce the application in *Yoder* of a heightened protection for issues involving hybrid claims—both free exercise and the parental assertion of the Due Process Clause—when it comes to educational issues.

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The

⁷⁷ *Id.* at 426.

⁷⁸ 521 U.S. 507, 536 (1997).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Ala. Const. amend. 622, § 3.01.

⁸² Ariz. Rev. Stat. Ann. § 41-1493 (West 2005).

⁸³ Conn. Gen. Stat. Ann. § 52-571b (West 2005).

⁸⁴ Fla. Stat. Ann. §§ 761.01-761.05.

⁸⁵ Idaho Code Ann. §§ 73-401 to 73-404 (Lexis 2006).

⁸⁶ 775 Ill. Comp. Stat. Ann. 35/1-35/99 (West 2001).

⁸⁷ Mo. Rev. Stat. Ann. § 1.302 (West Supp. 2007).

⁸⁸ N.M. Stat. §§ 28-22-1 to 28-22-5 (2000).

⁸⁹ Okla. Stat. Ann. tit. 51, §§ 251-253 (West Supp. 2007).

⁹⁰ 71 Pa. Consol. Stat. Ann. §§ 2401-2407 (West Supp. 2006).

⁹¹ R.I. Gen. Laws §§ 42-80.1-1 to 42-80.1-4 (2006).

⁹² S.C. Code Ann. §§ 1-32-10 to 1-32-60 (2006).

⁹³ Tex. Civ. Prac. & Rem. Code Ann. § 110 (2005).

Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the [right] . . . to direct the education and upbringing of one's children⁹⁴

The line of cases referenced above provides strong support for objections to dissection brought by the parents of minors, where the free exercise claim of the child is coupled with the parents' own objections regarding the application of a particular curriculum in a public school setting. However, education policy and requirements are not subject to a federal mandate, but instead fall under the purview of state and local governments.⁹⁵ The Fourteenth Amendment requires the states to apply First Amendment protections to their own actions, so even state, county, or individual school policies would fall under the Constitutional protection offered by the Free Exercise Clause.⁹⁶

But does an ethical objection to harming animals and participating in dissection rise to the level of a protected religious interest under the First Amendment? Whether a particular idea or belief is a "religious" idea is addressed by the Supreme Court in *Thomas v. Review Board of the Indiana Employment Security Division*.⁹⁷ The Court held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."⁹⁸ The case dealt with any objection to the substance of a religious claim, which the Court has been careful to characterize as a "sincerely held belief," without any requirement that it be connected with the dogma of an organized religious order.⁹⁹

VI. OPPOSITION TO DISSECTION LITIGATED

To date, only one published case specifically deals with the issue of dissection as a protected free exercise claim—*Kissinger v. Board of Trustees of Ohio State University College of Veterinary Medicine*.¹⁰⁰ In 1990, a veterinary student named Jennifer Kissinger, who was attending school at Ohio State's College of Veterinary Medicine, requested that she be allowed to use an alternative curriculum to that typically designated for third year veterinary students.¹⁰¹ The standard curriculum included surgery on live animals obtained solely for use of the students; the animals were subsequently euthanized.¹⁰² At first, the

⁹⁴ *Wash. v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (internal citations omitted).

⁹⁵ Cornell L. Sch. Leg. Info. Inst., *Education Law: An Overview*, <http://www.law.cornell.edu/wex/index.php/Education> (accessed Apr. 14, 2007).

⁹⁶ U.S. Const. amend. XIV.

⁹⁷ 450 U.S. 707, 713–15 (1981).

⁹⁸ *Id.* at 714.

⁹⁹ *Id.* at 716, 726.

¹⁰⁰ 786 F. Supp. 1308, 1310 (S.D. Ohio 1992).

¹⁰¹ *Id.* at 1309.

¹⁰² *Id.*

college considered developing an alternative curriculum and set up a committee to develop that curriculum.¹⁰³ Then, in September 1990, Ms. Kissinger received a letter from the college's attorneys indicating that no alternative curriculum would be provided; she had to complete the course requirements—including the live animal surgery—or fail.¹⁰⁴

Instead, Ms. Kissinger filed a suit in the United States District Court for the Southern District of Ohio.¹⁰⁵ The suit contended that the college had denied her rights to the free exercise of religion, free speech, freedom of association, and equal protection.¹⁰⁶ In April 1991, the alternative curriculum committee finally offered Ms. Kissinger an acceptable alternative to the live animal surgery.¹⁰⁷ The case would have ended, except that Ms. Kissinger filed a suit to recover attorneys' fees as the "prevailing party" in the litigation.¹⁰⁸ The district court denied—and the court of appeals affirmed—Ms. Kissinger's motion for attorneys' fees based on the merits of her claim.¹⁰⁹

In determining whether Ms. Kissinger was entitled to attorneys' fees as the "prevailing party" in a suit that was settled, the court applied a two-prong test: (1) whether the civil rights action was a catalyst for the settlement in favor of the plaintiff and (2) whether the civil rights claims were "frivolous, unreasonable or groundless."¹¹⁰ The court held that the suit was a catalyst for the settlement because it reversed the college's position expressed in the letter sent by its attorneys in September 1990.¹¹¹ However, the court also found that the plaintiff did not have a basis in law for her First Amendment, due process, or equal protection challenges.¹¹² This is where the case becomes interesting.

The holdings in *Nadeau v. Helgemoe* and *Johnston v. Jago* established that a court may consider whether a suit has merit without a full trial on the merits.¹¹³ The *Kissinger* court asserted that it was not restricted to the pleadings in determining whether there was legal merit and it could consider all of the facts and law in the case.¹¹⁴ Citing *Employment Division*, the *Kissinger* court stated that the "Free Exercise Clause does not, however, 'relieve an individual of the obliga-

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1309–10.

¹⁰⁵ *Id.* at 1310.

¹⁰⁶ 786 F. Supp. at 1310.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1314; *Kissinger v. Bd. Trustees Ohio St. U. College Veterinary Med.*, 5 F.3d 177, 181 (6th Cir. 1993).

¹¹⁰ 786 F. Supp. at 1310–12.

¹¹¹ *Id.* at 1311.

¹¹² *Id.* at 1313–14.

¹¹³ *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978) (overruled) (although overruled on other grounds, this point remains intact); *Johnston v. Jago*, 691 F.2d 283, 286 (6th Cir. 1982) (citing *Nadeau*, 581 F.2d at 281).

¹¹⁴ 786 F. Supp. at 1312.

tion to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."¹¹⁵

In *Vandiver v. Hardin County Board of Education*, the Sixth Circuit extended the *Employment Division* holding to a plaintiff who claimed that high school equivalency testing requirements violated his religious beliefs and thus were prohibited by the Free Exercise Clause.¹¹⁶ The court found that the testing requirement was "a valid and neutral law of general applicability within the meaning of [*Employment Division*], so that a free exercise challenge is presumably precluded."¹¹⁷

In *Kissinger*, the court followed *Vandiver*, holding that:

[a]lthough compliance with the curriculum may have required conduct of the plaintiff that was offensive to her religious beliefs, "the first amendment does not prevent the government from regulating behavior associated with religious beliefs." This is especially true where the conduct is required as a result of wholly voluntary attendance at an educational institution.¹¹⁸

To summarize, the *Kissinger* court discounted the "hybrid claim," because it found that all of the other claims stemmed from the free exercise claim and were not independent constitutional infractions.¹¹⁹

The Court recognizes no right, constitutional or otherwise, of a student that requires an educational institution to tailor its curriculum or method of teaching to that student's personal beliefs, particularly where attendance at the educational institution is purely at the will of the student. An educational institution has a strong interest in developing a standard curriculum for all students to follow, without numerous individual exceptions to fit individual beliefs which might compromise the quality of the education or the reputation of the institution. Students have no right to tell their teachers how they are to be taught.¹²⁰

Kissinger was affirmed on appeal in 1993.¹²¹ The appellate court made a substantial distinction based on the fact that Ms. Kissinger had chosen to attend the university at issue, knowing its policies, rather than being compelled to attend.¹²²

VII. APPLICABILITY TO FUTURE CHALLENGES

The specifics of the ruling in the *Kissinger* case leave more room for a definitive decision in favor of—rather than against—a constitu-

¹¹⁵ *Id.* (quoting *Empl. Div.*, 494 U.S. at 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stephens, J. concurring in judgment))).

¹¹⁶ 925 F.2d 927, 932 (6th Cir. 1991).

¹¹⁷ *Id.*

¹¹⁸ 786 F. Supp. at 1313 (quoting *Vandiver*, 925 F.2d at 932) (internal citation omitted).

¹¹⁹ *Id.* at 1313-14.

¹²⁰ *Id.* at 1314.

¹²¹ 5 F.3d at 177, 181.

¹²² *Id.* at 180-81.

tional free exercise claim, especially with regard to students in grades K-12. Even without the availability of a "compelling interest" requirement under a state RFRA, the hybrid nature of a claim should prevail. The free exercise claim of a minor, coupled with a due process claim by the parents, creates a heightened level of scrutiny that would be difficult to overcome.

First, no state mandates dissection in grade school as a requirement for graduation. It would be difficult to show that a school or district policy requiring dissection rises to the level of a state law, especially when it does not have the compelling interest of enforcement. Second, lesser means are available to accommodate the religious objections of students, means that have already been widely implemented throughout the country.¹²³ In addition to looking at the specific elements of a constitutional challenge, the elements of the case, and the standard of review, it is helpful to see how such a case would be—and has been—treated in the courts. The dearth of dissection choice cases or similar litigation poses a challenge in arguing precedent, but filings and pleadings can be helpful in setting forth the elements of a successful case.

A. Model for Litigation: The Graham Case

In one very relevant case, *Graham v. Board of Trustees of the Victor Valley Union High School District*, a tenth grader refused to dissect, citing her own deeply held moral beliefs and her mother's religious beliefs in the universal brotherhood of life.¹²⁴ The school principal refused to accept this protest, as it was not based on an organized religion that he recognized.¹²⁵ A Board of Trustees policy required dissection with no exceptions; otherwise, the Board would lower Ms. Graham's grade and put a notation in her record.¹²⁶ The State Education Code required the science class at issue, though not the dissection element of the class.¹²⁷

Ms. Graham and her mother filed claims for free exercise and due process, based on damage to Jenifer's reputation, standing, and property interest in her education.¹²⁸ An additional discrimination charge was brought for failure to give consideration to Ms. Graham's individual religious beliefs, simply because they were not part of an organized religion.¹²⁹

The federal court dismissed the case in 1988 with the provision that the school provide Ms. Graham with a frog that had died of "natu-

¹²³ Balcombe & George, *supra* n. 32.

¹²⁴ Pl.'s 1st Amend. Compl., *Graham v. Bd. Trustees Victor Valley Union High Sch. Dist.*, CV-87 03764 (C.D. Cal., filed Dec. 15, 1987) (copy on file with *Animal L.*).

¹²⁵ *Id.* at ¶ 8.

¹²⁶ *Id.* at ¶ 5.

¹²⁷ *Id.* at ¶ 4.

¹²⁸ *Id.* at ¶ 11-13.

¹²⁹ *Id.* at ¶ 13-14.

ral causes" so she could fulfill the dissection requirement.¹³⁰ No such frog was forthcoming.¹³¹ Ms. Graham appealed, the court of appeals ordered counsel to submit settlement statements, and the case was settled in December 1990.¹³² The school removed all negative notations from Jenifer's record and graded her independent tutorial on the anatomy unit with an A.¹³³ The school agreed to pay Ms. Graham's legal fees.¹³⁴

Because these cases were settled and not fully adjudicated, only the pleadings are still available, and no legal precedent was set. Yet it was a classic example of how litigation goes on the issue of dissection. On a side note, during the course of this suit, the state of California passed a law mandating that students who object to dissection be given an alternative.¹³⁵ The Animal Legal Defense Fund launched a Dissection Hotline at the request of Pat Graham, Ms. Graham's mother, in order to provide a legal resource for students like Ms. Graham.¹³⁶ Finally, in 1989, CBS produced an after school special entitled "Frog Girl: The Jenifer Graham Story," which received a Genesis Award and continues to be viewed nationwide.¹³⁷ While the *Graham* case is not the only challenge that has found its way into court, it remains the most thorough treatment of the possibilities of litigation challenging mandatory classroom dissection. The outcome surpassed its intention, giving relief to this student and ultimately to all students in the state of California by prompting the passage of a student choice law.

B. Settlements in Related Cases

Most mandatory dissection cases settle soon after they are filed, so no case law is available on point. In a majority of cases, the information enters the public record once the controversy reaches the press. News stories are the most common source of information in tracking challenges to dissection, along with the assistance given to many of these students by NAVS through its Dissection Hotline.¹³⁸ The following are among the highest profile cases documented. In 1989, Maggie McCool was given a grade of zero for each dissection assignment she

¹³⁰ Don Hendershot, *The Jenifer Graham Case #87-03764 § I* (Mar. 1991) (unpublished internal chronology, fact sheet, and review) (copy on file with *Animal L.*).

¹³¹ *Id.*

¹³² *Id.*; see also Animalearn, *Jenifer Graham: The First Student to Legally Take On Dissection & Students' Rights*, <http://www.animalearn.org/images/graham.pdf> (accessed Apr. 8 2007) (explaining the general course and results of Graham's case).

¹³³ Hendershot, *supra* n. 130, at § I.

¹³⁴ *Id.*

¹³⁵ Cal. Educ. Code Ann. § 32255.1; Animalearn, *supra* n. 132.

¹³⁶ *Dissection Hotline*, *supra* n. 50 (The Dissection Hotline became more a source of counseling and personal advice than a legal resource, and in 1993 NAVS took over the Hotline and added the *Dissection Alternatives Loan Program* to provide a solution for students who did not want to dissect.).

¹³⁷ Animalearn, *supra* n. 132; Hendershot, *supra* n. 130, at § III.

¹³⁸ *Dissection Hotline*, *supra* n. 50.

refused to perform.¹³⁹ Ms. McCool's father, Joe McCool, brought a proceeding against the Woodstown-Pilesgrove School in New Jersey, with assistance from the American Civil Liberties Union.¹⁴⁰ The suit was ultimately settled, Ms. McCool's grade was recalculated without the grades of zero, and her refusal to dissect was removed from her record.¹⁴¹ In addition, the high school determined that all students with religious objections would be provided with alternatives to dissection in the future.¹⁴²

In *Routh v. State University of New York at Stony Brook*, another biology frog dissection case, Ms. Routh was told that she would receive a grade of zero for the lab if she did not dissect.¹⁴³ Ms. Routh attended the lab, studied a model, took the test, and was not penalized.¹⁴⁴ She dropped the suit.¹⁴⁵

Meanwhile, the availability of alternatives to dissection has become widespread and the quality of these alternatives has improved greatly over the years, making arguments against their use less credible.¹⁴⁶ Many universities have forsaken dissection as a mandatory teaching practice, and others have adopted policies that allow for alternative procedures.¹⁴⁷

Of course, where state dissection choice laws are in place, the outcome of a request not to dissect is assured. In 2001, Heather Evanoff, a student at Granite City High School in southern Illinois, refused to dissect.¹⁴⁸ The Illinois legislature had passed a student choice law the previous year.¹⁴⁹ Ms. Evanoff was refused accommodation by her school, with the faculty and administration adamantly opposed to her request.¹⁵⁰ However, the school district relented when a NAVS lawyer contacted the school's attorney on Ms. Evanoff's behalf.¹⁵¹

Even without state dissection choice laws, students frequently receive accommodation for requests for alternatives to dissection, if not immediately, when their decision to take further action is asserted. In 2002, Jennifer Watson—a student in Baltimore County, Maryland—

¹³⁹ Mercury News Wire Servs., *N.J. 'Frog Girl' Wins Battle over Classroom Dissection*, San Jose Mercury News 2A (July 26, 1989).

¹⁴⁰ Elizabeth Anderson, *A Lesson Refused and a Lesson Learned*, 1 N.Y. Times 12NJ (Aug. 27, 1989).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Sarah Lyall, *Suit Dropped on Frog Dissection*, 13 N.Y. Times 12LI (Oct. 7, 1990).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ PCRM, *Dissection Alternatives*, http://www.pcrm.org/resch/anexp/dissection_alternatives.html (accessed Apr. 14, 2007).

¹⁴⁷ PCRM, *supra* n. 49.

¹⁴⁸ Aisha Sultan, *Dissection of Animals Becomes Issue at Schools*, St. Louis Post-Dispatch B1 (Apr. 20, 2001).

¹⁴⁹ 105 Ill. Comp. Stat. Ann. 112 (West 2006).

¹⁵⁰ Memo. from Linda M. Petty, Director, NAVS Dissection Hotline & Dissection Alternatives Loan Program to Tom Holloway, Admin. Asst., Granite City Sch. Dist. (Nov. 17, 2000) (copy on file with *Animal L.*).

¹⁵¹ Sultan, *supra* n. 148.

was refused an alternative and forced to drop an honors science class after being told that she could not complete the course without dissecting.¹⁵² Two days later, Ms. Watson was back in class after the school district's Office of Science announced an unwritten policy of providing alternatives to dissection.¹⁵³

In 2001, Trulie Nobis—a student at Monroe Community College in New York—was refused an alternative to dissection in her biology class by school officials.¹⁵⁴ Although New York has a law that covers students in grades K-12, college level courses are not included.¹⁵⁵ Ms. Nobis was told that there were no alternatives to animal dissection and that her religious belief would not be accommodated.¹⁵⁶ When Ms. Nobis indicated that she would file suit, the college agreed to extend partial credit for the course, reclassifying her time spent in the nondissection portion of the class as an independent study.¹⁵⁷ In addition, the college agreed to establish a specific policy regarding students' objections to dissection and to sponsor a campus-wide discussion on this topic.¹⁵⁸

VIII. CONCLUSION

The question remains: is there a constitutionally protected right *not* to dissect? The answer remains: maybe. Grounds for making the claim certainly exist, as well as case law arguments that can be made with credibility. Where the issue is not "frivolous, unreasonable, or groundless," and, where a state RFRA exists requiring the application of a "compelling need" test, there is no doubt that a plaintiff would prevail. Under the application of the *Employment Division* test, however, it may be necessary to invoke a hybrid First and Fifth Amendment claim by both the minor student and a parent or guardian in order to prevail.¹⁵⁹

The need for dissection choice legislation is not as urgent as it once was, because schools overall are more accommodating of students' ethical objections. But no student should be barred from a career in the sciences because he or she is too humane to pass a course that requires dissection. More and better laws are needed to ensure that ethical students—and ultimately, ethical scientists—receive the protection and humane alternatives they deserve.

¹⁵² HSUS, *Baltimore County Student Allowed to Skip Dissection*, http://www.hsus.org/animals_in_research/animals_in_research_news/baltimore_county_student_allowed_to_skip_dissection.html (Sept. 26, 2002).

¹⁵³ *Id.*

¹⁵⁴ Matthew Daneman, *Debate Over Dissection*, *Rochester Democrat & Chron.* (Mar. 10, 2001) (available at <http://mail.rochester.edu/~nobs/dissection/newspaper/story.htm>).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 494 U.S. at 886.