THE FAILURE OF ABSTINENCE-ONLY EDUCATION: MINORS HAVE A RIGHT TO HONEST TALK ABOUT SEX

HAZEL GLENN BEH* & MILTON DIAMOND**

The federal government spends over $170 million annually to subsidize states and community organizations that provide abstinence-only sex education[1] to America's youth.[2] This type of sex education[3] is limited to teaching that a monogamous, marital, heterosexual relationship is the "expected standard of human activity"[4] and that sex outside such a relationship will be physically and psychologically harmful.[5] Abstinence-only education also advocates only one method to prevent disease and pregnancy, abstinence, and it offers no information concerning contraception and disease prevention except that all methods other than abstinence fail.[6] As a result of its singular focus, the curricula not only pose

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* Professor, William S. Richardson School of Law. J.D., University of Hawai'i; Ph.D., University of Hawai'i.

** Professor, John A. Burns School of Medicine. Ph.D., University of Louisville. Support for Milton Diamond's work has come from the Eugene Garfield Foundation, Philadelphia, Pennsylvania. The authors express appreciation to Professor Sylvia Law for her helpful comments on early drafts.

[1] For the purposes of this Article, "abstinence-only education" is used synonymously with "abstinence-only-until-marriage education." Similarly, this Article includes "abstinence-plus," a curriculum that emphasizes abstinence but also includes broader sex information, in its definition of comprehensive sex education.

[2] MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REP., CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS i (2004), *available at* http://www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf [hereinafter WAXMAN REPORT].

[3] 42 U.S.C.S. § 710(b)(2)(A) (2005) (defining abstinence education as a program which "has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity").

[4] § 710(b)(2)(D).

[5] § 710(b)(2)(E).

[6] *See* § 710 (b)(2)(C).

significant problems with respect to ensuring minors' sexual health, but also ignore the needs of sexual minority youth altogether.[7]

The debate regarding what to teach minors about sex is a political battle over defining American values. While the nation engages in this debate, however, America's youth are paying the price.[8] Comprehensive reviews of abstinence-only curricula have consistently noted that they contain false or misleading public health information.[9] Recently, United States Representative Henry A. Waxman released a report ("Waxman Report") evaluating "the content of the most popular abstinence-only curricula used by grantees of the largest federal abstinence initiative."[10] It concluded that over eighty percent of federal grants go to providing abstinence-only curricula that "contain false, misleading, or distorted information about reproductive health,"[11] including exaggerations about contraceptive failure rates,[12] the physical and mental health risks of abortion,[13] and the health susceptibilities of the gay population.[14]

Aside from the dangers that such curricula pose for teenagers, this type of sex education fails in that it is not what a majority of Americans want. A recent poll by National Public Radio, the Kaiser Family Foundation, and Harvard University's John F. Kennedy School of Government found that more than seventy-five percent of Americans believe it is appropriate to provide young people with a broad curriculum that includes reliable information regarding contraception and protection from sexually transmitted diseases (STDs).[15]

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[7] *See infra* note 122 and accompanying text.

[8] Hannah Brückner & Peter Bearman, *After the promise: the STD consequences of adolescent virginity pledges*, 36 J. ADOLESCENT HEALTH 271, 273-77 (2005) [hereinafter Brückner & Bearman, *After the promise*].

[9] *See infra* notes 157-163 and accompanying text.

[10] WAXMAN REPORT, *supra* note 2, at i.

[11] *Id.*

[12] *Id.* at 8.

[13] *Id.* at 13-14.

[14] *Id.* at 19-20.

[15] NATIONAL PUBLIC RADIO ET AL., SEX EDUCATION IN AMERICA 2 (2003), *available at* http://www.kff.org/newsmedia/upload/Sex-Education-in-America-Summary.pdf [hereinafter SEX EDUCATION IN AMERICA]. Similarly, the Pew Forum on Religion and Public Life recently reported that a large majority of the American public wants schools to provide students with information as to birth control while at the same time delivering an abstinence message. PEW FORUM ON RELIGION & PUBLIC LIFE, ABORTION AND RIGHTS OF TERROR SUSPECTS TOP COURT ISSUES 8 (2005), *available at*

More important than the desires of the general public, however, are the needs of the students to whom the curricula are taught. Indeed, adolescents are the primary stakeholders in the debate concerning sex education, yet their needs and interests are not driving federal policy. Adolescents need a voice in the sex education debate based on their legal rights. The law has recognized that mature minors enjoy certain fundamental rights in matters of their own sexuality that need not yield to lesser state and parental interests. Moreover, state laws generally allow mature minors to make their own choices regarding, among other things, contraception, prenatal care, treatment of STDs, and adoption. The autonomy and privacy rights accorded to minors concerning their own sexuality entitles them to a corresponding right to the truthful, accurate, and complete information necessary to make wise choices.

However, a distinction must be drawn between the state's interest in inculcating the value of abstinence, and the state's misguided and unethical interest in disseminating false, incomplete, and misleading sexual health information to young people for the purposes of emphasizing that value, as it is only the latter that is indefensible. This second course may be taken because proponents of abstinence-only sex education worry that comprehensive education dilutes the abstinence message. However, there is no evidence that providing comprehensive sex information to minors increases the propensity to engage in sex prematurely or reduces the impact of the abstinence message.[16] On the contrary, comprehensive sex education empowers minors to act responsibly and in their best self-interest. In the words of the American Academy of Pediatrics Committee on Adolescence, "encouraging abstinence and urging better use of contraception are compatible goals."[17]

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http://pewforum.org/docs/index.php?DocID=91. Even by religion, "[s]olid majorities in every major religious group say schools should be allowed to provide students with information on birth control." *Id.* The poll did, however, note that "a sizable minority of white evangelical Protestants (30%) are opposed." *Id.*

[16] As the American College of Obstetricians and Gynecologists notes,

there is a pervasive fear in the United States that sex education will promote adolescent sexual activity and increase the risk of pregnancy, STDs, and HIV infection among teenagers. Careful and objective scholarly research during the last two decades has shown that sex education does not increase rates of sexual activity among teenagers and does increase knowledge about sexual behavior and its consequences. It also increases prevention behaviors among those who are sexually active.

Adolescent Sexuality and Sex Education, American College of Obstetricians and Gynecologists, http://www.acog.org/departments/dept_notice.cfm?recno=7&bulletin=3271 (last visited Sept. 10, 2005).

[17] Jonathan D. Klein & Committee on Adolescence, *Adolescent Pregnancy: Current Trends and Issues*, 116 PEDIATRICS 281, 284-85 (2005).

Abstinence-only sex education is anything but educational. At best, it deprives students of the knowledge necessary to manage their own sexual health. At worst, it is dangerous to minors and to the public health. As the Waxman Report concluded, "[s]erious and pervasive problems with the accuracy of abstinence-only curricula may help explain why these programs have not been shown to protect adolescents from sexually transmitted diseases and why youth who pledge abstinence are significantly less likely to make informed choices about precautions when they do have sex."[18] In a society that purports to value children, the state should foster healthy, informed minors who are equipped to manage their sexual health responsibly. At the very least, the state should not encourage or support educators and programs in misleading children and promoting false, dangerous, and potentially injurious practices.

This Article does not take exception to the federal government's authority to use its resources to inculcate the value of abstinence among adolescents, despite the fact that expecting abstinence to persist until marriage is likely an unrealistic objective.[19] Instead, this Article questions the practice of providing federal funding for unproven programs that do not adequately serve either the needs of minors or the health interests of the public. The federal government may have a legitimate interest in advancing certain social values; however, there can be no legitimate interest in funding invalid and foolhardy programs that harm the nation's youth. This Article argues that sexually mature minors are entitled to accurate and complete information about sex, and that, once the state has affirmatively undertaken to fund or provide sex education,[20] it has an obligation to ensure that the curricula it supports are complete and accurate.

Part I of this Article first discusses the sexual development and health of young people, and then turns to the risks and consequences of

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[18] WAXMAN REPORT, *supra* note 2, at ii.

[19] There are numerous and complex individual characteristics, as well as social, socioeconomic, and developmental influences, affecting the age of sexual debut. Peter S. Bearman & Hanna Brückner, *Promising the Future: Virginity Pledges and First Intercourse*, 106 AM. J. SOC. 859, 864-70 (2001) [hereinafter Bearman & Brückner, *Promising the Future*]. Despite extensive efforts to influence the age of sexual debut, "initiation of sexual intercourse during adolescence remains the norm for American youth." Committee on Psychosocial Aspects of Child & Family Health & Committee on Adolescence, American Academy of Pediatrics, *Sexuality Education for Children and Adolescents*, 108 PEDIATRICS 498, 498 (2001).

[20] The federal government's own website, http://4parents.gov/, designed to assist parents in talking to their children about sex, was also criticized for providing inaccurate, inadequate, and incomplete information. Press Release, SIECUS, National Public Health Professionals find HHS' 4parents.gov Website Inaccurate and Ineffective: Site Includes Multiple Inaccuracies, Misleading Information, and Biases (July 13, 2005), *available at* http://www.siecus.org/media/press/press0102.html.

unprotected sexual activity. Part II continues by examining current federal policy of exclusively funding abstinence-only-until-marriage education, as well as its growing influence. Part III compares abstinence-only-until-marriage and comprehensive sex education, highlighting the shortcomings of the former. Part IV goes on to challenge the legitimacy of the state's interest in supporting abstinence-only sex education when balanced against the minor's rights and interests, concluding that adolescents' rights compel a comprehensive sex education policy.

I. THE SEXUAL NATURE OF AMERICAN TEENS

In the following sections, this Article explores several intersecting issues. Puberty, the process of sexual maturation, typically begins at about age eight, nine, or ten, and is usually completed before individuals leave their teens. Nevertheless, American teenagers are encouraged to forego sexual activity, postpone marriage, and spend time preparing for adult careers. Although abstinence during these adolescent years may be regarded in adult society as socially desirable, many minors engage in a variety of sexual activities that expose them to preventable health risks, including unintended pregnancy and the transmission of HIV and other STDs. How best to protect their sexual health while still encouraging sexual restraint has long been a contentious debate in America.

A. From Puberty to Adolescence as a Developmental Stage of Life

Prior to discussing sex education, and its applicability to the current sexual practices of American teenagers, it is useful to note the conceptual differences between puberty and adolescence, as this underscores the issues concerning sexual development and education. Puberty is a biological process of sexual maturation, while adolescence is a stage of life recognized in Western societies, which spans from childhood to adulthood. It lasts longer than puberty, and does not end at sexual maturation. During adolescence, although minors may be sexually mature and physically capable of sexual relations, American society prefers not to recognize their sexuality or condone their sexual conduct.

Puberty is an extended process that takes, on average, 4.5 years to complete,[21] and is remarkably transformative in both males and females. In the period of a few years, a child's body undergoes dramatic internal and external physical changes and develops adult sexual function and fertility.[22]

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[21] Belinda Pinyerd & William B. Zipf, *Puberty—Timing is Everything!*, 20 J. PEDIATRIC NURSING 75, 76 (2005) ("In boys and girls, the pubertal sequence of events follows a certain pattern . . . on average requiring a period of 4.5 years (range 1.5-6 years), with girls beginning puberty earlier than boys.").

[22] *Id.* at 75-78.

Puberty also marks a period of profound psychological and psychosocial change.[23] Although variable,[24] girls in the United States today experience the onset of puberty at nine or ten years and the average age of menstruation at twelve years.[25] "Between the mid-19th and the mid-20th century, the average menarcheal age decreased remarkably from 17 to under 14 y[ears] in [the] United States . . . ."[26] Boys begin pubertal development around 11.5 years,[27] with "[s]perm production coincid[ing] with testicular and penile growth, generally occurring at age of 13.5-14 years."[28] Sometime during puberty, perhaps one to three years after spermarche, the first appearance of sperm, the typical boy becomes reproductively capable. Less is known of historical trends concerning the timing of male puberty, and thus it is difficult to say whether there has been any downward shift in the age at which puberty begins in boys.[29]

While puberty is a universal biological process, the recognition of adolescence as a *developmental stage* of life is a relatively modern phenomenon. Historically, there was no prolonged identifiable developmental period between childhood and adulthood, and among many non-Western cultures, there still is none.[30] This period evolved in Western societies as a consequence their industrialization over the past one hundred years, whereby it became the norm for young people to delay careers, marriage, and childbearing into their late twenties and to share common experiences that were unique to their age. As historian Jeffrey Moran observes:

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[23] *Id.*

[24] *See generally* Anne-Simone Parent et al., *The Timing of Normal Puberty and the Age Limits of Sexual Precocity: Variations around the World, Secular Trends, and Changes after Migration*, 24 ENDOCRINE REVIEWS 668 (2003) (discussing possible factors affecting age of onset of puberty, including nutrition, genetics, biology, socioeconomic conditions, environment, and migration).

[25] *Id.* at 670. "The commonly used markers of the timing of female puberty are thelarche and menarche . . . . Thelarche is the first appearance of breast development defined as Tanner B2 stage. . . . Menarche, the occurrence of the first menstruation, is a unique and relatively late marker of female puberty." *Id.* at 669.

[26] *Id.* at 673.

[27] *Id.* at 672. "In boys, the first sign of pubertal development is an increase in testicular volume above 3ml, consistent with Tanner G2 stage." *Id.* at 669.

[28] Pinyerd & Zipf, *supra* note 21, at 77.

[29] *See* Parent et al., *supra* note 24, at 672.

[30] José A. Nieto, *Children and adolescents as sexual beings: cross-cultural perspectives*, 13 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 461, 466-68 (2004).

> The [social] invention of adolescence rested on three important material changes in the nineteenth century. First, as the end of the nineteenth century approached, young people were increasingly segregated and sorted by age, especially in the rapidly expanding public schools . . . . Second, . . . the average age at puberty declined over the course of the century, so young people were becoming sexually mature earlier in life. Finally, at the same time, the period of training and education for young men, especially, grew longer. So men and women increasingly delayed marriage . . . .[31]

The difficulty for modern society became how to cope with the sexual maturation of adolescents before society was willing to acknowledge them as sexual beings.

It was in this context of increasing recognition of adolescence as its own "unique period of life" that the modern sex education movement flowered. [32] As Americans increasingly postponed marriage and employment well beyond the teen years, while at the same time reaching sexual maturation earlier, there seemed a heightened need to address teenage sexuality.[33] "Many Americans at the turn of the [twentieth] century commented that this extended period of forbidden sexuality was a garden of temptation, an almost cruel prolongation of youthful Sturm und Drang."[34] Some early proponents of sex education viewed the prolonged period of adolescent chastity as essential to developing good character, and they recognized that young people needed guidance and instruction in order to curtail sexual impulses.[35]

The movement to include sex education in American schools thus began at the turn of the twentieth century as a way of encouraging sexual restraint during the increased time between sexual maturation and

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[31] JEFFREY P. MORAN, TEACHING SEX: THE SHAPING OF ADOLESCENCE IN THE 20TH CENTURY 15 (2000).

[32] *Id.* at 1-22.

[33] *Id.* at 15 (noting three important trends in the nineteenth century that impacted adolescence: age segregation in schools, decline in the age of the onset of puberty, and delay of marriage into the late twenties).

[34] *Id.* "Sturm und Drang" translates from the German as "Storm and Stress" and here captures the turmoil of unfulfilled sexual desire during the teen years. COLUMBIA ENCYCLOPEDIA (6th ed. 2005), *available at* http://www.bartleby.com/65/st/Sturmund.html.

[35] MORAN, *supra* note 31, at 16-17. Victorian-era psychologist and social scientist G. Stanley Hall, like many of his contemporaries, believed that chastity was the hallmark of "civilized" (as opposed to "savage") youth and that a period of chastity allowed "the individual time to develop the newer, higher evolutionary traits." *Id.* Hall is attributed with identifying adolescence as a "unique period of life" in the early twentieth century. *Id.* at 1-22.

marriage.[36] Whether, what, and how to teach about sex, however, has always been controversial.[37] From the start, there was a fear that sex education might lead to sexual activity. It was thought that "[t]he sex educators' goal was to satisfy and thereby *divert* sexual curiosity; instruction that was overly explicit or overly advanced was at least as likely as a prudish silence to arouse the child's harmful interest."[38] Sex education was initially conceived as a way to promote and restore Victorian values during the prolonged developmental period of adolescence.[39] Rising rates of venereal disease and a concern that parents and the church had lost moral authority and the competency to curb sexual immorality were early justifications for placing the sex education of youth in the hands of professionals.[40] Early sex education proponents thus sought to reduce the incidence of STDs by providing graphic information on the consequences of venereal disease and the evils of promiscuity and prostitution,[41] but without encouraging sexual activity or prurient interests.[42] Indeed, these advocates calmed opponents by assuring that the purpose of "[s]ex education was not to create new sexual ideals, but rather to make young people into . . . 'strict adherents of the *established* code of sexual

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[36] *Id.* at 39-40.

[37] *Id.* at 230-34.

[38] *Id.* at 58.

[39] *Id.* at 16-17.

[40] *Id.* at 1-67 (tracing twentieth century history of sex education until World War I). So-called traditionalists in the early decades of the twentieth century opposed sex education, although they too agreed that American morality was declining:

> Although the traditionalists' concern for the public "tone" echoed the social hygienists' own critique of a morally disintegrating American society, traditionalists clearly dissented from the proposal to use the school system to buttress these crumbling walls. Contrary to the sex educators' opinions, traditionalists vigorously denied that religion, the family, and the community needed to be replaced as institutions of social order. Instead, many opponents broadened their criticism of sex education to condemn the general tendency of state institutions to encroach on traditional prerogatives of the family and community.

Id. at 64. Proponents held otherwise, arguing that "'[i]f you want young men to be chaste, you must teach them about sex matters before they ever [have] any such connections.'" *Id.* at 36 (quoting Bernard S. Talmey, Reply to Richard Cabot, *Are Sanitary Prophylaxis and Moral Prophylaxis Natural Allies?*, 5 J. SOC'Y FOR SANITARY & MORAL PROPHYLAXIS 41-42 (1914)).

[41] *Id.* at 34-36, 49.

[42] *Id.* at 39.

morality.'"[43] However, usurping the domain of the church and family, even for the lofty objective of promoting chastity, did not sit well with traditionalists who preferred silence to sex education.[44] As Moran observes, promoting sex education always raised issues of morality, as "[b]etween the need for timeliness and the dangers of suggestiveness lay an exceedingly narrow path."[45] Importantly, these early clashes demonstrate quite clearly that value inculcation has always been at the fore of the sex education debate.

Over the course of the twentieth century, sex education broadened beyond simply extolling the virtue of chastity and the dangers of sex. The health needs of American soldiers during several world wars was one of the many influences that led health educators to recognize the value of practical preventive information as opposed to merely instilling fear.[46] Evolving sex practices and changing demographics also influenced the progress and growth of the sex education movement.[47] In the latter years of the twentieth century, as a result of public health concerns and a broader view of human sexuality, sex education became more forthright, increasingly comprehensive, and accepted a more positive view of human sexuality.[48]

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[43] *Id.* at 67 (quoting MAURICE A. BIGELOW, SEX EDUCATION: A SERIES OF LECTURES CONCERNING KNOWLEDGE OF SEX IN ITS RELATION TO HUMAN LIFE 61, 192 (MacMillon 1918) (1916)).

[44] *Id.* at 62-66.

[45] *Id.*

[46] *Id.* at 68, 116, 118-20.

[47] *Id.* at 165-69.

[48] In the mid-twentieth century, sex education began to focus on "family life education" rather than simple social hygiene (e.g., health and disease prevention). *Id.* at 139-41. During the sexual revolution of the second half of the twentieth century, sex education increasingly became more "forthright," comprehensive, and "nonjudgmental." *Id.* at 160-65.

In the 1970s, Milton Diamond co-produced and hosted a thirty-hour PBS television series titled *Human Sexuality*, which was financed by the University of Hawaii College of Continuing Education. The series covered the biological, sociological, and psychological aspects of sex; offered presentations on family planning as well as birth, pregnancy, and abortion; and discussed STD prevention. It addressed controversial topics as well, including prostitution, pornography, nudism, homosexuality, and transgender issues. The series met with widespread approval and acceptance. Milton Diamond, *Human Sexuality: Mass Sex Education and Community Reaction*, 1976 J. SEX EDUC. & THERAPY 1; Milton Diamond, *Education sexuelle de masse: la television au service de la santé publique*, 35 MÉDICINE ET HYGIÈNE 2418 (1977); Milton Diamond, *Sex Education on Television: An Early History of Some Firsts*, 11 J. SEX EDUC. & THERAPY 30 (1985).

Just as early sex education was "highly prescriptive and moralistic,"[49] current federal sex education policy has again regressed to this form of sex education. Today, as in the past, themes of "danger and disease" [50] dominate federal policy on sex education, [51] rather than information and empowerment.

B. Current Sexual Practices and Health Risks of American Teens

The majority of teenagers can and do engage in sexual activities during and after sexual maturation, regardless of marital status. In fact, approximately fifty percent of males and females between the ages of fifteen and nineteen have engaged in vaginal intercourse, and that number rises to approximately sixty-three percent when other forms of sexual contact, such as oral and anal sex, are included.[52] On average, males experience their first sexual intercourse at 16.9 years and women at 17.4 years.[53] Women are typically sexually active for eight and men for ten years before marriage.[54] This interval, however, is likely to increase since the age

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[49] RONALD WILLIAM MORRIS, VALUES IN SEXUALITY EDUCATION: A PHILOSOPHICAL STUDY 91 (1994).

[50] One reporter describing the findings of the Waxman Report captured the fear-based focus of current policy:

> Many American youngsters participating in federally funded abstinence-only programs have been taught over the past three years that abortion can lead to sterility and suicide, that half the gay male teenagers in the United States have tested positive for the AIDS virus, and that touching a person's genitals "can result in pregnancy," a congressional staff analysis has found.

Ceci Connolly, *Some Abstinence Programs Mislead Teens, Report Says*, WASH. POST, Dec. 2, 2004, at A1.

[51] MORAN, *supra* note 31, at 217.

[52] William D. Mosher et al., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Sept. 15, 2005, at 25, *available at* http://www.cdc.gov/nchs/products/pubs/pubd/ad/361-370/ad362.htm. *See* ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: SEXUALITY EDUCATION (2002), *available at* http://www.agi-usa.org/pubs/fb_sex_ed02.pdf; Klein & Committee on Adolescence, *supra* note 17, at 281.

[53] ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: SEXUAL AND REPRODUCTIVE HEALTH: WOMEN AND MEN (2002), *available at* http://www.agi-usa.org/pubs/fb_10-02.pdf.

[54] *Id.*

of marriage is rising.[55] More and more, sexual exploration during adolescence includes sexual activity other than coitus.[56]

Some of the consequences of improvident sexual activity, such as STDs or unintended pregnancies, can have devastating effects on the health, welfare, and future of young people. Notably, pregnancy among teens has declined in the past decade or so, which is attributed to both delays in the initiation of sexual intercourse and improved contraceptive practices.[57] Although the trend is downward, "more than 4 in 10 adolescent girls have been pregnant at least once before 20 years of age."[58] On the other hand, while the rate of some STDs,[59] particularly syphilis and gonorrhea, among American youth has decreased in recent years, others, such as genital herpes and chlamydia, have risen.[60] STDs are health problems that occur more frequently in the adolescent and young adult populations than in older populations,[61] with one in four sexually active teens contracting an STD each year, and half of new HIV infections occurring in individuals under age twenty-five.[62] Despite the risk of pregnancy and disease, only sixty-

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[55] North America is seeing "a steady rise[] in the age at marriage, to the mid-to late twenties. In all regions, less-educated women are likelier to marry young." Sexual and Reproductive Self-Determination: Voluntarism and Marriage, United Nations Family Planning Agency, http://www.unfpa.org/intercenter/reprights/self-sec2.htm (last visited Sept. 10, 2005).

[56] For example, the Centers for Disease Control recently reported that, between the ages of fifteen and seventeen, "13 percent of males and 11 percent of females had had heterosexual oral sex but not vaginal intercourse." Mosher et al., *supra* note 52, at 2.

[57] *See* John S. Santelli et al., *Can Changes in Sexual Behaviors Among High School Students Explain the Decline in Teen Pregnancy Rates in the 1990s?*, 35 J. ADOLESCENT HEALTH 80, 84-88 (2004). Santelli et al. concluded that "[o]verall 53% of the decline in pregnancy rates can be attributed to decreased sexual experience . . . and 47% to improved contraceptive use." *Id.* at 80.

[58] Klein & Committee on Adolescence, *supra* note 17, at 282.

[59] STDs include such diseases as gonorrhea, syphilis, genital herpes, human papilloma virus (HPV), hepatitis B, trichomoniasis, and HIV/AIDS.

[60] Hillard Weinstock et al., *Sexually Transmitted Diseases Among American Youth: Incidence and Prevalence Estimates, 2000*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 6, 7 (2004). Chlamydia remains "the most common bacterial sexually transmitted disease (STD), particularly among sexually active adolescents and young adults." Chlamydia: Questions & Answers, American Social Health Association, http://www.ashastd.org/learn/learn_chlamydia.cfm (last visited Sept. 10, 2005).

[61] While fifteen to twenty-four year-olds represent only one-quarter of the sexually experienced population aged fifteen to forty-four, they accounted for forty-eight percent (9.1 million) of new cases of STDs in the year 2000. Weinstock et al., *supra* note 60, at 6, 8-9.

three percent of high school students having coitus "reported having used a condom the last time they had intercourse."[63]

It is important to note that the health burden of sexual behavior is not borne equally by men and women. Generally, "[w]omen bear a disproportionately high proportion of the overall sexual behaviour attributable health burden in the United States."[64] The explanation for the increased impact on women is rooted in part on profound biological and anatomical differences that make it easier for women to acquire STDs, render these diseases harder to detect in women, and make their consequences more serious for women and their offspring.[65] In addition, inadequate attention is paid to the routine screening needs of women, especially given that many STDs with long-term health consequences may be asymptomatic in females.[66] For example, the human papilloma virus

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[62] KAISER FAMILY FOUNDATION, U.S. TEEN SEXUAL ACTIVITY 1, 2 (2005), *available at* http://www.kff.org/youthhivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf [hereinafter U.S. TEEN SEXUAL ACTIVITY]. It should also be noted that some STDs, like herpes and HIV, can be treated but not cured; these are life long afflictions.

[63] Klein & Committee on Adolescence, *supra* note 17, at 282.

[64] S. H. Ebrahim et al., *Sexual Behaviour: related adverse health burden in the United States*, 81 SEXUALLY TRANSMITTED INFECTION 38, 39 (2005). For a full discussion of how health burden is measured, see Michael Vlassoff et al., OCCASIONAL REP. NO. 11, ASSESSING COSTS AND BENEFITS OF SEXUAL AND REPRODUCTIVE HEALTH INTERVENTIONS 10-13 (2004), *available at* http://www.agi-usa.org/pubs/2004/12/20/or11.pdf. HIV/AIDS is an exception, in that the health burden from HIV is shared between men and women. However, "[i]f HIV related mortality were excluded, more than 80% of sexual behaviour related mortality would be those among women." Ebrahim et al., *supra*, at 38.

[65] Women's vulnerability is due in part to a number of factors such as: women acquire STDs more easily from men during sexual intercourse than vice-versa; women remain asymptomatic more often, allowing the STD to progress untreated; the vaginal environment is more conducive to the growth of STD organisms and to mucosal tears that allow entry of infection into the bloodstream; long term sequelae, such as cervical cancer, are more common in women; and women must "negotiate" male condom use and are often powerless to insist on their use. Helen Varney Burst, *Sexually Transmitted Diseases and Reproductive Health in Women*, 43 J. OF NURSE-MIDWIFERY 431, 431, 434 (1998). *See also* Sevgi O. Aral et al., Conference Summary, *Disproportionate Impact of Sexually Transmitted Diseases on Women*, 11 EMERGING INFECTIOUS DISEASES (2004), http://www.cdc.gov/ncidod/EID/vol10no11/04-0623_02.htm; K.J. Elford & J.E.H. Spence, *The Forgotten Female: Pediatric and Adolescent Gynecological Concerns and Their Reproductive Consequences*, 15 J. PEDIATRIC ADOLESCENT GYNECOLOGY 65, 65-66 (2002); David H. Emmert & Jeffrey T. Kirchner, *Sexually transmitted diseases in women: Gonorrhea and syphilis*, 107 POSTGRADUATE MED. 181 (2000), *available at* http://www.postgradmed.com/issues/2000/02_00/emmert.htm.

[66] *See* Burst, *supra* note 65, at 431 (noting that the association between STDs and long term sequelae in women, including ectopic pregnancies, cancers, liver disease, and pelvic inflammatory diseases, may be overlooked).

(HPV), carried by approximately twenty million persons in the United States, can cause cervical cancer in women,[67] and chlamydia, "the most commonly reported notifiable disease in the United States,"[68] with nearly 3 million new cases per year,[69] can lead to chronic pelvic inflammatory disease, infertility, and an increased risk of ectopic pregnancy.[70]

Additionally, only women become pregnant, and thus females bear increased health burdens[71] and face greater socioeconomic consequences than men when it comes to unplanned pregnancies.[72] Over ninety percent of pregnancies among fifteen to nineteen year olds are described as unplanned in the United States, and while the rate is declining, it lags behind other industrialized countries.[73] Loss of educational opportunities, diminished income, and lower potential or current employment, along with single-parent status, larger family size, increased health risks, and poorer parenting

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Although routine screening of women at risk for STDs is recommended, it is often neglected. Ebrahim et al., *supra* note 64, at 39-40. *See* Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You to Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119, 159-60 (1998) (citing studies that recommend increased routine screening for chlamydia infection in sexually active young women and noting inadequate insurance coverage).

[67] Ebrahim et al., *supra* note 64, at 39.

[68] Weinstock, supra note 60, at 6-7.

[69] *Id.*

[70] Gale R. Burstein et al., *Incident* Chlamydia trachomatis *Infections Among Inner-city Adolescent Females*, 280 JAMA 521, 524 (1998).

[71] *See* Ebrahim et al., *supra* note 64, at 39 (discussing adverse health burdens related to pregnancy).

[72] *See* Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364-68 (1998) (discussing the economic and social consequences of unintended pregnancies on women).

[73] Klein & Committee on Adolescence, *supra* note 17, at 283. *See* Jacqueline E. Singh Darroch et al., *Differences in Teenage Pregnancy Rates Among Five Developed Countries: The Roles of Sexual Activity and Contraceptive Use*, 33 FAM. PLAN. PERSP. 244 (2001). The pregnancy rates coincide with the type of sex education that different countries offer:

> The United States is unique in its battle over sexuality education, compared to most other developed nations. Most European nations not only embrace comprehensive sexuality education but also integrate it into government-sponsored pregnancy and sexually transmitted infection prevention campaigns. The resulting teen pregnancy rates are substantially lower than those in the United States, despite similar levels of sexual activity.

WILLIAM J. TAVERNER, TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN HUMAN SEXUALITY 3 (8th ed. 2002).

skills are among the many negative consequences of early unplanned pregnancy that fall primarily on women.[74]

The health of women more directly affects the well-being of infants and children as well. For example, the "vertical transmission" of STDs from a mother to her child "is occurring on a wider scale than was previously recognized."[75] STDs passed along in the uterus or during childbirth can have fatal consequences.[76] In addition, adolescent pregnancy has been associated with premature birth, low-birth weight, and a higher infant and maternal mortality rate.[77] Children of adolescent mothers bear important social burdens as well, including shame and stigma, "developmental delay, academic difficulties, behavioral disorders, substance abuse, early sexual activity, depression, and [a greater likelihood of] becoming adolescent parents themselves."[78]

II. CURRENT FEDERAL SEX EDUCATION POLICY

In light of the realities of teen sexuality and adolescent well-being, the socioeconomic impact of STDs and unplanned pregnancies among minors, and the general needs of the public health, the importance of developing and implementing effective sex education programs cannot be overstated. Unfortunately, politics, rather than public health, has driven curricular decisions for many years.[79] As researcher Jeffrey Moran notes,

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[74] Jacqueline Corcoran, *Consequences of Adolescent Pregnancy/Parenting: A Review of the Literature*, 27 SOC. WORK HEALTH CARE 49, 50-60 (1998); Sandra L. Hofferth et al., *The Effects of Early Childbearing on Schooling over Time*, 33 FAM. PLAN. PERSP. 259 (2001); George D. Lowe & David D. Witt, *Early Marriage as a Career Contingency: The Prediction of Educational Attainment*, 46 J. MARRIAGE & FAM. 689 (1984); *see also* Klein & Committee on Adolescence, *supra* note 17, at 283-84. Klein & Committee on Adolescence, however, note that the "long-term social outcomes [they describe] are not inevitable." *Id.* at 283.

[75] Stephen J. Genuis & Shelagh K. Genuis, *Managing the sexually transmitted disease pandemic: A time for reevaluation*, 191 AM. J. OBSTETRICS & GYNECOLOGY 1103, 1106 (2004).

[76] *Id.* HIV, herpes simplex virus, human papilloma virus, and syphilis are among the STDs that can be passed on to the infant. Moreover, possible links between maternal STDs and childhood diseases have recently been recognized. *Id.*

[77] Klein & Committee on Adolescence, *supra* note 17, at 283.

[78] *Id.* at 284.

[79] Jeffrey P. Moran provides a comprehensive history of the sex education movement in the twentieth century. He observes that "[w]e take the shape of sex education almost for granted today, but cut away at the tree and you see concentric circles of historically specific elements, such as the politicized character of sex education, the centrality of public education, the dominance of instrumentalist thinking, and sex education's antierotic bias." MORAN, *supra* note 31, at 230.

> [t]he controversies surrounding sex education since the 1960s have underscored the subject's centrality in a culture in which sexuality is simultaneously more public and more politicized. As the pendulum swings back and forth between sexual liberalism and social conservatives, the debate over sex education has seemed to become less a dispute over the curriculum than a ritual dance to signify a broader range of social and sexual attitudes.[80]

The political battle over curricular choices in schools is not a minor skirmish in the polarized American political landscape. According to Professor Kenneth Karst, the control of American schools has long been regarded as a major prize in political warfare.[81] Thus, the dispute over school issues such as implementing abstinence-only versus comprehensive sex education is not merely a debate over the educational or health needs of young people, but rather one concerning a broader objective to define America's values.[82] As Karst observes, control of the schools is regarded as a significant victory for one group or another:

> The "common school," as the American public school was called, has been expected from the beginning to inculcate common values. For one social group after another, that expectation has translated into a desire, and often a legislative program, to make

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[80] *Id.* at 216. The abstinence-only message has infiltrated the United States' global health policy as well. *See* Asia Russell, Case Study, *The Bush Administration's Global AIDS Promises – and Praxis*, 4 YALE J. HEALTH POL'Y L. & ETHICS 133, 138-39 (2004); Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 784 n.158, 785 n.160 (2004); Kaci Bishop, Comment, *Politics Before Policy: The Bush Administration, International Family Planning, and Foreign Policy*, 29 N.C. J. INT'L L. & COM. REG. 521, 530-32, 547-48, 567-68 (2004); *U.S. abstinence push may be hurting AIDS fight*, REUTERS, Aug. 29, 2005, *available at* http://msnbc.msn.com/id/9118071/. In the words of one United Nations official:

> The U.S. government's emphasis on abstinence-only programs to prevent AIDS is hobbling Africa's battle against the pandemic by downplaying the role of condoms . . . . [T]he U.N. secretary general's special envoy for HIV/AIDS in Africa [stated that] fundamentalist Christian ideology was driving Washington's AIDS assistance program . . . with disastrous results.
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> *Id.*

[81] *See* Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 992-93 (2003); *see also* Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 395 (1996) (observing that a "child-centered description of parents' rights . . . raises serious concerns among religious and political conservatives who view parents' rights as natural rights antedating the State").

[82] *See* Karst, *supra* note 81, at 992-93, 997-98.

> the public schools express the group's moral values as the true national values. When Our group wins a battle in the schools, we see ourselves as capturing part of a huge expressive apparatus that we can point toward a dual purpose. First, we expect the schools to acculturate children to Our authoritative meanings. . . . Second, we hope to capture the schools in order to reassure ourselves of Our group's status dominance as the true Americans.[83]

It is for these reasons that the lines have been drawn so sharply in the abstinence-only-until-marriage versus comprehensive sex education debate.[84]

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[83] *Id.* at 992-93. Gary Bauer, former president of the conservative Christian Family Research Council, once stated that "[w]e are engaged in a social, political, and cultural war. There's a lot of talk in America about pluralism. But the bottom line is somebody's values will prevail. And the winner gets the right to teach our children what to believe." Doublethink, Conservative Babylon, Part 1: Sex and the Not-So-Single Republican: Ankeney to Burton, http://blogs.salon.com/0002551/2003/12/08.html (Dec. 8, 2003, 23:25 EST).

[84] Among many others, one source for information promoting the abstinence-only viewpoint is the Heritage Foundation. The Heritage Foundation, http://www.heritage.org (last visited Sept. 10, 2005). Again, among many others, one source with materials promoting comprehensive sex education is the Sexuality Information and Education Council of the United States. SIECUS, http://www.siecus.org (last visited Sept. 10, 2005).

A. Federal Funding Programs

Three federal programs,[85] the Adolescent Family Life Act (AFLA),[86] Section 510 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Section 510),[87] and the Special Projects of Regional and National Significance—Community Based

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[85] The federal government does not dictate the curricular choices of states that expend their own money to fund sex education, but government monies are difficult to resist. State and local school district approaches to sex education vary broadly. SEICUS maintains a website that tracks the profile of sex education state-by-state. *See* SEICUS, STATE PROFILES (2004): A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES, *available at* http://www.siecus.org/policy/states/index.html. *See also* Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 WOMEN'S RTS. L. REP. 27, 31 (2002).

Abstinence-only education is at odds with other federal policies. For example, the Healthy People 2010 program, operated under the auspices of the Office of Disease Prevention and Health Promotion, U.S. Department of Health and Human Services, sets a year 2010 goal of increased use of contraception and barrier protection against disease among unmarried adolescents aged fifteen to seventeen. HEALTHY PEOPLE 2010, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OBJECTIVES: 9-10, *available at* http://www.healthypeople.gov/document/html/objectives/09-10.htm (last visited Sept. 10, 2005). It also seeks to "increase the proportion of young adults who have received formal instruction before turning age 18 years on reproductive health issues, including all of the following topics: birth control methods, safer sex to prevent HIV, prevention of sexually transmitted diseases, and abstinence." HEALTHY PEOPLE 2010, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OBJECTIVES: 9-11, *available at* http://www.healthpeople.gov/document/html/objectives/9-11.htm (last visited September 10, 2005). Healthy People 2010 is a federal initiative, collaborating with the states and the private sector, that sets an ambitious public health agenda for the nation. *See generally* What is Healthy People?, http://www.healthypeople.gov (last visited September 10, 2005). Other federal agencies have also called for increased contraceptive use. In 2001, President Bush's then current Surgeon General David Satcher released a report calling for comprehensive sex education programs that include the teaching of abstinence but also other methods of preventing unwanted pregnancy and STDs. DAVID SATCHER, THE SURGEON GENERAL'S CALL TO ACTION TO PROMOTE SEXUAL HEALTH AND RESPONSIBLE SEXUAL BEHAVIOR (2001), *available at* http://www.surgeongeneral.gov/library/sexualhealth/call.pdf.

[86] 42 U.S.C.S. § 300z (2005). For a period of five years in the 1990s, following litigation commencing in 1983 which alleged that the AFLA violated the Establishment Clause, the AFLA operated under a settlement agreement providing that, among other things, AFLA programs must be medically accurate and may not include religious references. Kendrick v. Sullivan, 766 F. Supp. 1180 (D.D.C. 1991); Rebekah Saul, *Whatever Happened to the Adolescent Family Life Act?*, 1 GUTTMACHER REPORT ON PUB. POL'Y 5, 10-11 (1998), *available at* http://www.agi-usa.org/pubs/tgr/01/2/gr010205.html.

[87] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C.S. § 710 (2005). The act is also referred to as Section 510 of Title V of the Social Security Act and will be referred to hereafter as "Section 510."

Abstinence Education,[88] support sex education focused exclusively on "abstinence-only education" as opposed to "comprehensive sex education" or "abstinence-plus"[89] education.[90] Educational activities under the AFLA must "promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations,"[91] while Section 510 provides block grants to states to establish educational programs with the "exclusive purpose [of] teaching the social, psychological, and health gains to be realized by abstaining from sexual activity."[92]

Under Section 510, federal funds given to states may be used for media campaigns and other such activities, or may be directed at certain school populations. States can therefore target federal abstinence money toward specific programs, while using their own funds for other educational programs that do not have an abstinence-only focus. For example, New Mexico recently announced that it would accept and use a $500,000 abstinence-only federal grant to fund elementary school sex education, but that it would teach a comprehensive curriculum in grades seven through twelve, in light of the fact that "30% of eighth graders, 20% of seventh

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[88] Initially known as SPRANS-CBAE, its administration was transferred to the Administration for Children and Families (ACF) Family and Youth Services Bureau and is now referred to as Community-Based Abstinence Education (CBAE). Abstinence Education, Maternal and Child Health Bureau, U.S. Dep't of Health and Human Services, http://mchb.hrsa.gov/programs/adolescents/abstinence.htm (last visited Sept. 10, 2005).

[89] "Abstinence-plus programs present abstinence from sexual intercourse as the first and best choice for adolescents, yet methods of contraception are discussed and their use encouraged for sexually active teens." David C. Wiley, *The Ethics of Abstinence-Only and Abstinence-Plus Sexuality Education*, 72 J. SCH. HEALTH 164, 164 (2002).

[90] For a comprehensive description of the history of this federal policy, see Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075, 1079-86 (2002) (describing federal policy initiatives and discussing their impact on sex education at the state level). The federal preference for abstinence-only education is also apparent under the federal No Child Left Behind Act, 20 U.S.C.S. § 7906 (2005), which prohibits federal funds authorized under the act to be used "to provide sex education or HIV-prevention education unless that instruction is age appropriate and includes the health benefits of abstinence." § 7906(a)(3).

[91] 42 U.S.C.S. § 300z(b)(1). The act provides funding for research, care, and prevention, of which educational services is a part. § 300z-1(a)(4)(G).

[92] 42 U.S.C.S. § 710(b)(2)(A). Section 510 requires the federal government to match $4 of every $7 provided by the states. § 710(c)(1) (applying the matching provisions outlined in 42 U.S.C.S. § 703 (2005)). Under Section 510, states may use the funds or distribute them to community-based grantees. Some states do not use state funds to match, but instead require grantees to provide the matching funds. SIECUS, SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES: AN OVERVIEW (2004), *available at* http://www.siecus.org/policy/states/2004/analysis.html [hereinafter SIECUS, SEXUALITY EDUCATION].

graders, and 15% of sixth graders reported being sexually active" in that state.[93] Thus, despite the federal focus on abstinence, sex education curriculum across the nation remains incredibly varied, as does parent participation and the opt-out rules promulgated by school districts.[94] The reach of federal abstinence education policies, however, is substantial; in 1999, it was estimated that "10% of U.S. school districts ha[d] a comprehensive sexuality education policy, 34% ha[d] an abstinence-plus policy, 23% an abstinence only policy, and 33% ha[d] no [sex education] policy . . . ."[95]

The impact of abstinence-only federal policy greatly expanded with the establishment of the Special Projects of Regional and National Significance-Community Based Abstinence Education (CBAE) in October 2000. CBAE, "the largest and fastest growing source of abstinence-only education,"[96] allows the federal government to direct grants to private and public entities for abstinence-only education.[97] Initially providing twenty million dollars in funding, by 2004, funding had increased to seventy-five million dollars, with over 100 grantees.[98] Because CBAE funds go directly to community organizations and do not require state matching or involvement, the administration became better able to promote abstinence, as it was partnering with grantees that embraced its message more wholeheartedly than the states.

CBAE funding is a significant force in promoting federal policy because these monies flow directly to private entities that apply for and receive government grants. Notably, CBAE funds are part of President Bush's so-called "faith-based and community initiatives" and are frequently

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[93] *New Mexico To Use Federal Abstinence Education Funding for Elementary School Programs*, MED. NEWS TODAY, Apr. 16, 2005, http://www.medicalnewstoday.com/medicalnews.php?newsid=22823#.

[94] ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: SEX AND STD/HIV EDUCATION (2005), *available at* http://www.agi-usa.org/statecenter/spibs/spib_SE.pdf. SIECUS also maintains a state-by-state analysis of sex education policies. SIECUS, SEXUALITY EDUCATION, *supra* note 92.

[95] David J. Landry et al., *Abstinence Promotion and the Provision of Information About Contraception in Public School District Sexuality Education Policies*, 31 FAM. PLAN. PERSP. 280, 283 (1999) [hereinafter Landry et al., *Abstinence Promotion*].

[96] WAXMAN REPORT, *supra* note 2, at 1.

[97] In 2000, Congress made $20 million dollars available for direct grants to public and private entities providing abstinence education. Act of July 13, 2000, Pub. L. No. 106-246, 114 Stat. 511 (2000).

[98] WAXMAN REPORT, *supra* note 2, at 1-2. Congress now appears to be retreating from generously funding CBAE. *See infra* note 106.

awarded to religious organizations.[99] Thus, the federal administration is bypassing state and public health organizations and instead turning to faith-based groups to champion its abstinence-only message.

The federal definition of abstinence-only education includes eight very specific provisions that implicitly preclude providing education about safe sex practices, including disease or pregnancy prevention, other than through abstinence.[100] Section 510 funded programs may not provide education that contradicts this definition, but need not place equal emphasis

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[99] OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, WHITE HOUSE, ABSTINENCE EDUCATION: SPRANS COMMUNITY-BASED ABSTINENCE EDUCATION PROJECT GRANTS & FORMULA PROGRAM: SECTION 510 ABSTINENCE EDUCATION GRANT PROGRAM, *available at* http://www.whitehouse.gov/government/fbci/grants-catalog-abstinence.html (last visited Sept. 10, 2005).

[100] The working definition presented in 42 U.S.C. § 710 (2005) applies to both CBAE and Section 510. The statute provides:

(2) For purposes of this section, the term "abstinence education" means an educational or motivational program which—

(A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;

(B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;

(C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;

(D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity;

(E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;

(F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;

(G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and

(H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

§ 710(b)(2). Preventive health behaviors other than abstinence are not discussed, as "[a]bstinence-only programs are based on a simple premise: give adolescents a clear and consistent message to wait until marriage to have sex. If birth control is mentioned, the message says that no birth control is 100% effective at preventing pregnancy and avoiding sexually transmitted diseases." Jerrold E. Barnett & Cynthia S. Hurst, *Abstinence Education for Rural Youth: An Evaluation of the Life's Walk Program*, 73 J. SCH. HEALTH 264, 264 (2003).

on each of the eight points.[101] However, programs funded under CBAE must teach all eight points.[102]

Federal funding for abstinence-only education has markedly increased over the past few years.[103] In his 2004 State of the Union Message, President Bush pledged to increase funding of abstinence-only education as the only "certain" and "right" message to minors:

> To encourage right choices, we must be willing to confront the dangers young people face - even when they are difficult to talk about. Each year, about three million teenagers contract sexually transmitted diseases that can harm them, or kill them, or prevent them from ever becoming parents. In my budget, I propose a grassroots campaign to help inform families about these medical risks. We will double Federal funding for abstinence programs, so schools can teach this fact of life: Abstinence for young people is the only certain way to avoid sexually transmitted diseases. Decisions children make now can affect their health and character for the rest of their lives. All of us - parents, schools, government - must work together to counter the negative influence of the culture, and to send the right messages to our children.[104]

For the year 2006, President Bush "proposed $206 million for an abstinence initiative, including: doubling the funding for abstinence-only education programs over three years; developing model abstinence-only education curricula; ensuring the Federal government is sending a consistent message to teens; and creating a public education campaign for parents and teens about this important issue."[105] Notably, however, Congress appears to be cooling; it did not fund abstinence-only education at

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[101] FAMILY AND YOUTH SERVICES BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, FISCAL YEAR 2005: ABSTINENCE EDUCATION FORMULA GRANT PROGRAM (SECTION 510) TO TITLE V SOCIAL SECURITY ACT, *available at* http://www.acf.dhhs.gov/programs/fysb/absfund-anncmt.PDF ("To the extent possible, we strongly encourage each State to develop programs that place equal emphasis on each element of the abstinence education definition.").

[102] "Curriculum developed or selected for implementation in the SPRANS Community-Based Abstinence Education Grants Program must address all eight elements of the Section 510 abstinence education definition and may not be inconsistent with any aspect of that definition." Community-Based Abstinence Education Project Grants (CBAE), 68 Fed. Reg. 68632, 68634 (Dec. 9, 2003).

[103] *See* WAXMAN REPORT, *supra* note 2, at 1.

[104] President George W. Bush, State of the Union Address (Jan. 21, 2004), *available at* http://www.gop.com/news/read.aspx?ID=3823.

[105] *Making A Difference for America's Youth*, REPUBLICAN NATIONAL COMMITTEE, Mar. 7, 2005, http://www.gop.com/News/Read.aspx?Id=5249.

the level President Bush sought in 2005.[106] Furthermore, responding to lawsuits on First Amendment grounds, the Department of Health and Human Services recently suspended federal funding to one controversial program, the Silver Ring Thing.[107] This trend away from abstinence-only education is also reflected in the fact that three states have rejected Section 510 abstinence-only federal funding: California, Pennsylvania,[108] and, most recently, Maine.[109]

III. SEX EDUCATION CURRICULAR APPROACHES

There is currently a great divide between sex education approaches. Although the difference between abstinence-only education and comprehensive sex education is sometimes cast as being "about whether instruction should stress abstinence,"[110] the controversy actually "centers, instead, on what information should be presented to students about how sexually active people can prevent unwanted pregnancy and STDs."[111] The following sections briefly describe the content divide between the two types of sex education, highlighting the particular shortcomings of abstinence-only curricula.

A. Comprehensive Sex Education

Comprehensive sex education "takes a broad and multi-faceted approach" to human sexuality and "seeks to provide students with a broad range of pertinent and factually accurate information."[112] While it teaches

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[106] Press Release, SIECUS, Abstinence-Only-Until-Marriage Program's Funds Suspended by HHS (Aug. 23, 2005), *available at* http://www.siecus.org/media/press/press0106.html. Furthermore, Democrats have introduced legislation in the Senate calling for a grant program to fund comprehensive sex education. Press Release, Office of Senator Frank Lautenberg, Senator Lautenberg Introduces Legislation to Provide Comprehensive Sex Education in Schools (Feb. 10, 2005), *available at* http://www.lautenberg.senate.gov/~lautenberg/press/2003/01/2005210905.html.

[107] Steven Ertelt, *Abstinence Education Program Loses Federal Funding After Lawsuit*, LIFENEWS.COM, Aug. 23, 2005, http://www.lifenews.com/nat1559.html.

[108] SIECUS, SEXUALITY EDUCATION, *supra* note 92.

[109] Press Release, SIECUS, Maine Becomes the 3rd State to Reject Federal Abstinence-Only-Until-Marriage Funding (Sept. 20, 2005), *available at* http://www.siecus.org/media/press/press0113.html.

[110] David J. Landry et al., *Factors Associated with the Content of Sex Education In U.S. Public Secondary Schools*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 261, 267 (2003).

[111] *Id.*

[112] Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. &

the benefits of abstinence in the teen years, comprehensive sex education also provides adolescents with wide-ranging information concerning methods to avoid pregnancy and disease.[113] Comprehensive sex education also promotes core values of mutual respect and self-responsibility,[114]

WOMEN'S STUD. 265, 266 (2000). *See* Jones, *supra* note 90, at 1076-79 (providing an overview of sex education approaches).

[113] *See generally* BILL TAVERNER & SUE MONTFORT, MAKING SENSE OF ABSTINENCE: LESSONS FOR COMPREHENSIVE SEX EDUCATION (2005) (providing sex educators with suggestions on how the message of abstinence may be incorporated into a comprehensive sex education curriculum).

[114] SIECUS has developed a series of guidelines for comprehensive sex education. It identifies the following "values inherent in [its] *Guidelines*" as:

• Every person has dignity and self worth.

• All children should be loved and cared for.

• Young people should view themselves as unique and worthwhile individuals within the context of their cultural heritage.

• Sexuality is a natural and healthy part of living.

• All persons are sexual.

• Sexuality includes physical, ethical, social, spiritual, psychological, and emotional dimensions.

• Individuals can express their sexuality in varied ways.

• Parents should be the primary sexuality educators of their children.

• Families should provide children's first education about sexuality.

• Families should share their values about sexuality with their children.

• In a pluralistic society, people should respect and accept the diversity of values and beliefs about sexuality that exist in a community.

• Sexual relationships should be reciprocal, based on respect, and should never be coercive or exploitive.

• All persons have the right and obligation to make responsible sexual choices.

• Individuals, families, and society benefit when children are able to discuss sexuality with their parents and/or trusted adults.

• Young people develop their values about sexuality as part of becoming adults.

• Young people explore their sexuality as a natural process in achieving sexual maturity.

• Early involvement in sexual behaviors poses risks.

seeking to impart the value of respect and to provide skill building to enable students to resist negative peer pressure.[115] Studies have shown that comprehensive sex education can help students delay the initiation of sexual activities and increase contraception use once such activity commences.[116] There is also a growing consensus within the international community that comprehensive sex education is a basic human right and reflects sound public health policy.[117]

• Abstaining from sexual intercourse is the most effective method of preventing pregnancy and STD/HIV.

• Young people who are involved in sexual relationships need access to information about healthcare services.

SEICUS, GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION 20 (3d ed. 2004), *available at* http://www.siecus.org/pubs/guidelines/guidelines.pdf.

[115] Clara S. Haignere et al., *Adolescent Abstinence and Condom Use: Are We Sure We Are Really Teaching What Is Safe?*, 26 HEALTH EDUC. & BEHAV. 43, 49 (1999).

[116] *Id.* (reviewing studies and observing that "research shows comprehensive sexuality education to have much more positive results than abstinence-only education"). Notably, the reduction in teen pregnancy is attributable to *both* postponing sexual activity and improved contraceptive practices. Santelli et al., *supra* note 57, at 80. Jeffrey Moran observes that sex education has suffered from its tendency to promise too much in terms of affecting behavioral change. MORAN, *supra* note 31, at 219, 229-30. The National Campaign to Prevent Teen Pregnancy issued a report in 2004 carefully evaluating the effectiveness of specific sex education programs that had been conducted under experimental or quasi-experimental design. JENNIFER MANLOVE ET AL., NOT YET: PROGRAMS TO DELAY FIRST SEX AMONG TEENS (2004), *available at* http://www.teenpregnancy.org/works/pdf/NotYet.pdf. It assessed affect on "*behavior*, rather than knowledge, attitudes, or other similar measures." *Id.* at 1-2. Early first sex is associated with a number of factors, including relationships with peers, parents, drinking, and drug behaviors, and thus sex education is only part of the picture. *Id.* at 3-4. As for abstinence-only education, the report noted that there are such limited studies that it is impossible to make general conclusions. However, it evaluated outcomes in one program with an experimental design and three with a quasi-experimental design. None of the abstinence programs reviewed showed an impact on sexual behaviors. *Id.* at 4. Some sex education programs (four of seven) and HIV/STD education programs (two of four) had an impact on delaying first sex. *Id.* at 5-6. A cookie-cutter approach certainly is not appropriate, especially since the effectiveness of programs is affected by the race and sex of the students. *Id.* at 7.

[117] *See, e.g.*, World Health Organization, *Sexual health: a new focus for WHO*, 67 PROGRESS IN REPROD. HEALTH RES. 1, 4-6 (2004), *available at* http://www.who.int/reproductive-health/hrp/progress/67.pdf; WORLD ASSOCIATION FOR SEXOLOGY, DECLARATION OF SEXUAL RIGHTS (1999), *available at* http://www.worldsexology.org/about_sexualrights.asp (recognizing, at the 14th World Congress of Sexology, the "right to comprehensive sexuality education").

B. Abstinence-Only-Until-Marriage Sex Education

Abstinence-only education, as established by federal law, is expressly not comprehensive; it "has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity."[118] It instructs that sex within marriage is the only way to protect sexual health, teaching that "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects"[119] and that "abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems."[120]

Abstinence-only education endorses sexual activity only within a heterosexual marital relationship, teaching that a "mutually faithful monogamous relationship in [the] context of marriage is the expected standard of human activity." [121] The curricula developed to promote abstinence are not inclusive; they discriminate against sexually minority youth by ignoring their sexual health needs altogether. [122] The lost opportunity to provide sex education for sexual minority youth is particularly unfortunate given that these adolescents have unique health risks but rarely confide in parents or health providers, and thus are less likely to receive sex education geared to their needs at home or during routine health care.[123]

Abstinence-only education focuses on the risks of sexual activity outside of marriage, yet it does not teach any methods of disease or pregnancy prevention other than abstinence. The failure to teach about effective methods of disease and pregnancy prevention is disturbing since, "[a]mong sexually active teens 15-17, important factors in choosing a method of birth control include 'how well it protects against HIV and other STDs' (98%)[,] 'how well it prevents pregnancy' (94%), and what 'side effects' may exist (93%)."[124] However, those who receive abstinence-only

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[118] 42 U.S.C.S. § 710(b)(2)(A) (2005).

[119] § 710(b)(2)(E).

[120] § 710(b)(2)(C).

[121] § 710(b)(2)(D).

[122] *See* James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665, 681-84 (2004) (discussing the failure of abstinence-only education to serve the needs of gay and lesbian students, and arguing that the programs are therefore discriminatory and violate Equal Protection rights).

[123] *See* Ellen C. Perrin et al., *Gay and Lesbian Issues in Pediatric Health Care*, 34 CURRENT PROBS. PEDIATRIC ADOLESCENT HEALTH CARE 355, 364-65 (2004).

[124] U.S. TEEN SEXUAL ACTIVITY, *supra* note 62, at 1.

instruction are not given the information they need to make informed choices. Furthermore, abstinence-only education does not satisfy what most parents want their children to know; a large majority of parents want minors to be given information about contraception and disease prevention in sex education classes.[125]

The "only" aspect of abstinence-only education is premised in part on a concern that providing information about disease and pregnancy prevention delivers a mixed message to adolescents that both offends the values of the majority of American families[126] and encourages sexual activity,[127] even though there is no evidence that providing accurate and complete sex information causes teens to engage in sex.[128] To the contrary, the American Academy of Pediatrics Committee on Adolescence recently concluded that

> encouraging abstinence and urging better use of contraception are compatible goals. Evidence shows that sexuality education that discusses contraception does not increase sexual activity, and programs that emphasize abstinence as the safest and best approach, while also teaching about contraceptives for sexually active youth, do not decrease contraceptive use.[129]

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[125] SEX EDUCATION IN AMERICA, *supra* note 15, at 1 (reporting that only "fifteen percent of Americans believe that schools should teach only about abstinence . . . and should not provide information on how to obtain and use condoms and other contraception").

[126] The Heritage Foundation, a conservative research and policy organization, issued a comparison of abstinence-only and abstinence-plus programs. It presented the view that teaching about contraception would "contradict and undermine basic values that parents want taught . . . ." SHANNAN MARTIN ET AL., COMPREHENSIVE SEX EDUCATION VS. AUTHENTIC ABSTINENCE: A STUDY OF COMPETING CURRICULA xii (2004), *available at* http://www.heritage.org/Research/Welfare/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=67539 .

[127] Although The Heritage Foundation acknowledges that "75% of parents want teens to be taught about both abstinence and contraception," it defends the abstinence-only curriculum. Robert E. Rector et al., *What Do Parents Want Taught In Sex Education Programs?*, HERITAGE FOUNDATION BACKGROUNDERS, Jan. 28, 2004, *available at* www.heritage.org/research/welfare/bg1722.cfm. Without data to support its position, it states that "nearly all abstinence educators assert that [teaching both abstinence and contraception use] would substantially undermine the effectiveness of the abstinence message." *Id.*

[128] Klein & Committee on Adolescence, *supra* note 17, at 284. Teaching about menstruation and puberty, for instance, prepares adolescents for likely changes they will experience. Teaching about it does not initiate either menstruation or puberty, it only prepares adolescents to understand these changes. Similarly, teaching about contraception, STD avoidance, and human sexuality does not create sexual desire or impulses, it merely educates and prepares students to understand their own and others' sexual natures.

[129] Klein & Committee on Adolescence, *supra* note 17, at 284.

Importantly, its voice is just one among many professional organizations that reject abstinence-only education for adolescents.[130]

C. The Shortcomings of Abstinence-Only-Until-Marriage Education

One of the most obvious critiques of abstinence-only education is that, despite the federal government's largesse, these programs so far have not proved effective in promoting abstinence or preventing STDs and unwanted pregnancy.[131] A more fundamental problem is a danger far greater than wasting valuable time and resources: even if abstinence-only curricula were shown to be extremely effective, they would still be inadequate because they fail that majority of minors who will not remain 100% abstinent. Indeed, there is increasing concern that some of these teenagers will be left worse off than before they took the course.[132] Simply put, while total abstinence, including giving up non-coital sexual activities, may be "100% effective" against pregnancy and STDs, abstinence-only curricula fail to pay adequate attention to their own "user-failure" rate.[133] User-failure, i.e., failing to remain abstinent even once, can result in pregnancy and disease exposure.[134] Thus, by not teaching prevention, the

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[130] *See infra* notes 164-172 and accompanying text.

[131] *See* MANLOVE ET AL., *supra* note 116, at 4-5; Brückner & Bearman, *After the promise*, *supra* note 8, at 277; Barnett & Hurst, *supra* note 100, at 264; Patricia Goodson et al., *Defining Abstinence: Views of Directors, Instructors, and Participants in Abstinence-Only-Until-Marriage Programs in Texas*, 73 J. SCH. HEALTH 91, 92, 94-96 (2003).

[132] The Centers for Disease Control recently released a report warning:

> Educational campaigns in recent years have encouraged teenagers to delay sexual activity and some concern has been raised that teenagers may be responding to this message by engaging in oral sex, in order to prevent pregnancy. There is evidence, however, that certain diseases can be transmitted through oral sex, including gonorrhea, chlamydia, chancroid, and syphilis. Some groups may also be at elevated risk of HIV transmission through oral sex, including men who have sex with men and certain drug users.

William D. Mosher et al., *supra* note 52, at 5-6 (internal citations omitted).

[133] Haignere et al., *supra* note 115, at 47.

[134] Haignere et al. note that "periodic abstinence" as a method of birth control has a "user-failure rate for pregnancy of 26%." *Id.* Others have calculated the pregnancy rate from "one completely random act of unprotected intercourse" at 3.1%. Allen J. Wilcox et al., *Likelihood of conception with a single act of intercourse: providing benchmark rates for assessment of post-coital contraceptives*, 63 CONTRACEPTION 211, 212 (2001). Wilcox et al. explain that

> the probability of conception is negligible during the first 3 days of the cycle. By day 7, the likelihood of pregnancy with intercourse is nearly 2%. This rises to a peak of nearly 9% on day 13. This probability declines thereafter but remains around 1% as late as day 40 and beyond.

curricula necessarily fail to meet the needs of most adolescents who will become sexually active before marriage even though they have participated in an abstinence-only curriculum.[135] Teaching only about abstinence is like teaching "a driver's education course in which teachers show students grisly photos of traffic accidents but never tell them to stop at red lights or buckle their seat belts."[136]

Abstinence-only education suffers from harmful definitional problems as well. Even among abstinence-only educators, the exact meaning of abstinence is unclear.[137] Since disease can be spread through physical contact other than vaginal intercourse, abstinence-only education programs "inadvertently expos[e] teens to greater risk of infection by promoting ignorance of the risk of STD transmission through non-coital sexual activity."[138] Pregnancy too is possible without coitus, by mutual masturbation practices that are often substituted for intercourse. Thus, a simplistic message of abstinence leaves students unable to make sound judgments about engaging in many forms of sexual exploration other than intercourse.

The user failure and definitional risks are not just theoretical. In one recent study that garnered a great deal of media attention, Hannah Brückner and Peter Bearman evaluated STD acquisition among adolescents taking "virginity pledges" as a symbolic commitment to abstinence until marriage.[139] Evaluating data over time from the National Longitudinal

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Id.

[135] In a previous study, Bearman and Brückner found that "promise breakers," those who took virginity pledges and then later engaged in sexual intercourse, were "less likely to be contraceptively prepared than nonpledgers." Bearman & Brückner, *Promising the Future*, *supra* note 19, at 902.

[136] Mary-Jane Wagle, *Abstinence Only: Breeding Ignorance*, L.A. TIMES, Dec. 7, 2004, at B13.

[137] Goodson et al., *supra* note 131, at 92-94; *see* Angela Nicoletti, *Perspectives of the Allied Health Care Professional: The Definition of Abstinence*, 18 J. PEDIATRIC ADOLESCENT GYNECOLOGY 57, 57 (2005) ("[A]bstinence-only programs vary widely in how or whether they define sex and what behaviors constitute abstinence."); *see also* Brückner & Bearman, *After the promise*, *supra* note 8, at 276 (examining the oral and anal sex practices of so-called "virginity pledgers").

[138] Nicoletti, *supra* note 137, at 58. This concern was echoed in the CDC's recent *Sexual Behaviors and Selected Health Measures*, which reported on rates and trends by age in sexual practices, including oral, anal, and same-sex activities. Mosher et al., *supra* note 52, at 5-6.

[139] Brückner & Bearman, *After the promise*, *supra* note 8. Researchers from the Heritage Foundation issued a paper criticizing the study. Robert Rector & Kirk A. Johnson, Adolescent Virginity Pledges and Risky Sexual Behaviors (June 14, 2005), http://www.heritage.org/Research/Welfare/whitepaper06142005-2.cfm.

Study of Adolescent Health, they found that, while pledgers delayed first sex and had fewer partners and cumulative exposure, pledgers' STD infection rates did not differ from nonpledgers over time. They concluded:

> Contrary to expectations, we found no significant differences in STD infection rates between pledgers and nonpledgers, despite the fact that they transition to first sex later, have less cumulative exposure, fewer partners, and lower levels of nonmonogamous partners. . . . Advocates for abstinence-only education assert that premarital abstinence and postmarital sex are necessary and sufficient for avoiding negative consequences of sexual activity, such as STDs. This assertion collides with the realities of adolescents' and young adults' lives in several ways. First, although pledgers experience sexual debut later than others, most of them will eventually engage in premarital sex. Those who do report lower frequency of condom use at first intercourse. Those who do not are more likely to substitute oral and/or anal sex for vaginal sex.[140]

Brückner and Bearman also found that pledgers were "over-represented" among adolescents having only oral and anal sex, were less likely to know their STD status, and were less likely to be tested for STDs.[141] They also reported that "female pledgers marry earlier,"[142] which of itself has negative consequences,[143] such as higher divorce rates.[144]

One of the specific strategies of abstinence-only education has been to exaggerate or mischaracterize the data on condom failure rates,[145] which poses significant risks because it gives the message that preventive measures are futile and pointless. When used properly, however, condoms

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[140] Brückner & Bearman, *After the promise*, *supra* note 8, at 277.

[141] *Id.* at 276-77.

[142] *Id.*

[143] George D. Lowe & David D. Witt, *Early Marriage as a Career Contingency: The Prediction of Educational Attainment*, 46 J. MARRIAGE & FAM. 689, 697 (1984) (noting that early married women have a reduced educational attainment). To the extent that these younger married couples also have children, they and their progeny face other negative consequences. Klein & Committee on Adolescence, *supra* note 17, at 283-84 (discussing the negative psychosocial consequences of adolescent pregnancy on both adolescents and their offspring).

[144] CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 134 (2004).

[145] Haignere et al., *supra* note 115, at 45; *see* WAXMAN REPORT, *supra* note 2, at 12.

are extremely effective at preventing disease transmission and pregnancy.[146] There are two types of condom failure rates: method failure and user failure. Method failure occurs when the product fails due to an inherent defect, while user failure is the result of incorrect or inconsistent use.[147] Importantly, user failure is much more common than method failure, with the largest category of user failure being inconsistent use.[148] Therefore, education about and classroom experience in using condoms can reduce user failure.[149] Also significant is that "[c]ondom use at first intercourse is a powerful predictor for subsequent consistent use."[150] Thus, by discouraging condom use as an effective method for contraception and disease prevention, abstinence-only education places teens at greater risk when they eventually do engage in sexual activity, and actually reinforces dangerous behaviors. By focusing on condom failure rates, rather than the effectiveness of condoms when used properly and consistently, these curricula actually conflict with the federal Center for Disease Control's official position that use of a latex condom is recommended as a preventive strategy against HIV infection.[151] It might be appropriate here to repeat the common line: "vows of abstinence break far more easily than latex condoms."[152]

Other criticisms of abstinence-only education include the overt religious messages these curricula often inject;[153] the negative and fear-

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[146] Haignere et al., *supra* note 115, at 45.

[147] *Id.* at 44.

[148] *Id.* at 46.

[149] *See id.* at 46-47 (discussing steps in the proper use of condoms).

[150] Brückner & Bearman, *After the promise*, *supra* note 8, at 276.

[151] Centers for Disease Control and Prevention, *Guidelines for Effective School Health Education to Prevent the Spread of AIDS*, 37 (S-2) MORBIDITY & MORTALITY WKLY. REP., Jan. 29, 1988, at 1-14, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001751.htm; Klein & Committee on Adolescence, *supra* note 17, at 282 ("The Centers for Disease Control and Prevention unambiguously recommends both abstinence and the use of barrier contraceptives for individuals who choose to be sexually active."). The CDC has also recommended the use of dental dams or other latex barriers for the prevention of sexually transmitted infections during cunnilingus. Can I get HIV from oral sex?, Divisions of HIV/AIDS Infection, Centers for Disease Control & Prevention, http://www.cdc.gov/hiv/pubs/faq/faq19.htm (last visited Sept. 10, 2005).

[152] Interview by Priscilla Pardini with Jocelyn Elders, former U.S. Surgeon General, *available at* http://www.rethinkingschools.org/sex/elders.shtml (last visited Sept. 10, 2005).

[153] Simson & Sussman, *supra* note 112, at 284-91 (discussing how "abstinence-only programs are rooted in a purpose of endorsing . . . conservative Christian views").

based messages they espouse about human sexuality; their neglect or hostility toward homosexuality; [154] and their pervasive gender stereotyping.[155] It also fails to acknowledge that "[sexuality] can foster intimacy and bonding as well as shared pleasure" and "fulfills a number of personal and social needs, and we value the sexual part of our being for the pleasures and benefits it affords us."[156] Abstinence-only education, rooted in fear and shame, neglects these positive aspects of human sexuality.

The Sexuality Information and Education Council of the United States (SIECUS) has conducted in-depth reviews of six federally funded abstinence-only education curricula.[157] In general terms, SIECUS concluded that "[a]lthough they vary, these curricula share a number of common characteristics: they are based on religious beliefs, rely on fear and shame, omit important information, include inaccurate information, and present stereotypes and biases as fact."[158] Similar findings were described in the Waxman Report.[159] Evaluating thirteen of the SPRANS (now referred to as CBAE) grantees' curricula, it concluded that "over two-thirds of abstinence-only education programs funded by the largest federal abstinence initiative" [160] contain "[f]alse [i]nformation" about the "[e]ffectiveness of [c]ontraceptives" and "[r]isks of abortion." [161] The Report also found that the curricula "[b]lur [r]eligion and [s]cience," "[t]reat stereotypes about [g]irls and [b]oys] as [s]cientific [f]act," and "[c]ontain [s]cientific errors."[162] A recent study of programs in Ohio, a state receiving $8.1 million for abstinence-only education, similarly found that the state's programs "confuse religion and science, perpetuate sexist

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[154] McGrath, *supra* note 122, at 682-84; Seiler, *supra* note 85, at 35-36.

[155] WAXMAN REPORT, *supra* note 2, at 16-18. The Waxman Report evaluated thirteen abstinence-only education programs, finding stereotypic messages concerning the ability and desire of girls to achieve, girls' vulnerability and dependence on males, and male sexual aggression and shallow emotions. *Id. See* Simson & Sussman, *supra* note 112, at 270.

[156] SATCHER, *supra* note 85, at 1.

[157] *See* SIECUS Reviews Fear-Based, Abstinence-Only-Until-Marriage Curricula, http://www.siecus.org/reviews.html (last visited Sept. 10, 2005).

[158] *Id.*

[159] WAXMAN REPORT, *supra* note 2, at 8, 13-14, 19-20.

[160] *Id.* at 22.

[161] *Id.* at i.

[162] *Id.* at ii.

stereotypes, do not provide guidance for gay adolescents and are not taught by trained health educators."[163]

Professional organizations, including, among many others, the American Medical Association,[164] the American Academy of Pediatrics,[165] the American Public Health Association,[166] the American College of Obstetricians and Gynecologists,[167] the American Psychological Association,[168] the Society for Adolescent Medicine,[169] the National Education Association,[170] the American School Health Association,[171] and the American Association of University Women,[172] have official policies

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[163] *Ohio Abstinence Programs Contain False Information About Abortion, Contraception, STDs, Report Says*, KAISER DAILY REPROD. HEALTH REP. (The Henry J. Kaiser Family Foundation, Washington, D.C.), June 8, 2005, *available at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=30587. In general, throughout the country, abstinence education programs are not taught by professionally trained sex educators.

[164] AMERICAN MEDICAL ASSOCIATION, H-170.968: SEXUALITY EDUCATION, ABSTINENCE, AND DISTRIBUTION OF CONDOMS IN SCHOOLS, *available at* http://www.ama-assn.org (search for "H-170.968," click on fourth result) (last visited Sept. 10, 2005).

[165] Committee on Psychosocial Aspects of Child and Family Health & Committee on Adolescence, American Academy of Pediatrics, *Sexuality Education for Children and Adolescents*, 108 PEDIATRICS 498, 498-99 (2001), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;108/2/498.pdf.

[166] The American Public Health Association, Policy Statement, *9309: Sexuality Education* (1993), *available at* http://www.apha.org/legislative/policy/policysearch/index.cfm?fuseaction=view&id=92.

[167] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ADOLESCENT SEXUALITY AND HEALTH EDUCATION (2005), *available at* http://www.acog.org/departments/dept_notice.cfm?recno=7&bulletin=3271.

[168] John Anderson, *Resolution In Favor of Empirically Supported Sex Education and HIV Prevention Programs for Adolescents*, AMERICAN PSYCHOLOGICAL ASSOCIATION, Feb. 10-20, 2005, *available at* http://www.apa.org/releases/sexed_resolution.pdf.

[169] Society for Adolescent Medicine, Position Paper, *Reproductive Health Care for Adolescents*, 12 J. ADOLESCENT HEALTH 649 (1991), *available at* http://adolescenthealth.org/PositionPaper_Reproductive_Health_Care_for_Adolescents.pdf.

[170] Press Release, National Education Association, NEA urges accurate health education: Censorship in abstinence-only programs is placing youth at risk (Oct. 8, 2003), *available at* http://www.nea.org/newsreleases/2003/nr031008.html.

[171] American School Health Association, Resolution, *Quality Comprehensive Sexuality Education* (1994, amended 2002), *available at* http://www.ashaweb.org/pdfs/resolutions/Qualcompsexed.pdf.

[172] American Association of University Women, Attacks on Reproductive Choice: Abstinence-Only Funding (2005), *available at*

supporting comprehensive sexuality education and opposing the state and federal mandates of abstinence-only education that censor information about condoms and contraception for the prevention of pregnancy, HIV transmission, and the spread of other STDs. Importantly, the widespread rejection of abstinence-only education by such influential organizations raises ethical issues for professional sex educators who are required to teach abstinence-only curricula.[173]

Not only is federal abstinence-only education policy out of step with the recommendations of professionals, but it also ignores the reality of adolescent sexuality. Statistics show that the majority of teens are or will be sexually active before marriage and many will experience negative and preventable health consequences.[174] Yet, present federal policy remains steadfast in its singular message of abstinence.

IV. A MINOR'S RIGHT TO COMPREHENSIVE SEX EDUCATION

Not only is abstinence-only education harmful for minors, but it also infringes on their privacy and autonomy interests in sexual health and procreation. The current sex education debate is frequently portrayed as a dispute over what values to indoctrinate in American youth; however, this mischaracterizes the real controversy, which is first and foremost about what *information* minors should have, not what *values* they should be taught. When framed in this manner, the privacy and autonomy interests of minors to make their own decisions about their sexual health and procreation choices are implicated.

A. Conflicting Rights and Interests

The issues surrounding adolescent sexuality raise nearly irreconcilable tensions between the adolescent, the parent, and the state, because each holds firmly established competing rights and interests.[175] The constitutional infirmities related to federal funding of abstinence-only

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http://www.aauw.org/issue_advocacy/actionpages/positionpapers/repro_abstinenceonly.cfm#4.

[173] *See* Wiley, *supra* note 89, at 164-66 (raising questions concerning ethical implications of programs that withhold information to secondary students and are regarded as ineffective).

[174] *See supra* notes 52-54 and accompanying text.

[175] Hazel G. Beh & James H. Pietsch, *Legal implications surrounding adolescent health care decision-making in matters of sex, reproduction, and gender*, 13 CHILD ADOLESCENT PSYCHIATRIC CLINICS N. AM. 675, 675-81 (2004).

programs with overt religious messages have been explored elsewhere.[176] However, religious entanglement issues are hardly the most harmful aspects of abstinence-only education. More detrimental is that these curricula endanger the health of minors and abridge the minors' constitutionally recognized privacy and autonomy interests related to sex.[177] Once the federal government affirmatively provides or funds others to provide education about sexual health to minors, it owes minors a curriculum that will not harm them and that will respect, rather than impair, their constitutional rights. The omissions and deceptions prevalent within these unfounded curricula both prevent minors from making informed choices and expose them to potentially grave dangers.[178]

When considering a minor's rights, parental rights and state interests are necessarily implicated as well; however, when either parents or the state are vested with power to make decisions for minors, they are empowered and obliged to act in the child's best interest. Parents are conferred the primary authority to inculcate moral and cultural values and to control the education of their children.[179] This power, however, has traditionally been limited by co-existing duties to serve the interests of the

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[176] Simson & Sussman, *supra* note 112, at 271-97 (providing a thorough constitutional analysis of comprehensive sex education challenges under the Free Exercise Clause and abstinence-only education under the Establishment Clause). The authors conclude by supporting comprehensive education without parental opt-out provisions because "the benefits in terms of religious liberty promised by such provisions are insufficient to warrant the costs to important state interests that they entail." *Id.* at 297. The authors are unsure whether the current Supreme Court would find a violation of the Establishment Clause when it comes to abstinence-only programs, but urge "lawmakers mindful of Establishment Clause values [to] not hesitate long before concluding that the abstinence-only approach is an unsound choice." *Id.*; *see* Jones, *supra* note 90, at 1086-1105 (noting that abstinence-only education espouses "information that is only in line with conservative Christian values" and arguing that Section 510 violates the Establishment Clause).

Just recently, in August 2005, following a lawsuit by the ACLU of Massachusetts, the U.S. Department of Human Services suspended funding for an abstinence-only education program titled the "Silver Ring Thing" for overtly promoting the Christian religion. Brendan Coyne, *Federal Funds Pulled from 'Ring Thing' Abstinence-only Advocate*, THE NEW STANDARD, Aug. 25, 2005, *available at* http://newstandardnews.net/content/?items=229&printmode=true.

[177] *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 691-700 (1977) (holding that minors enjoy a privacy interest in decisions affecting procreation).

[178] *See supra* notes 139-151 and accompanying text.

[179] *Carey*, 431 U.S. at 691-700. *See also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944).

child,[180] and is grounded in the presumption that a parent's "natural bonds of affection lead parents to act in the best interests of children."[181]

The state has competing interests aimed at protecting children and society;[182] state interests in fact serve as a limitation on parental authority.[183] In education, the state's interest has garnered a particular judicial respect, with the Supreme Court noting that "[p]roviding public schools ranks at the very apex of the function of a State."[184] Indeed, state interests in education cannot be underestimated, as the Court has characterized the public education of youth as essential to the nation's collective survival as a democratic society, stating that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[185] Like parental rights and "high duties," the state's role in education is characterized as both a state interest and an obligation to prepare minors for full participation in democratic society.[186] Thus, both the rights of parents and the interests of

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[180] *Prince*, 321 U.S. at 167 (observing "that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").

[181] Parham v. J.R., 442 U.S. 584, 602 (1979); *see also* Troxel v. Granville, 530 U.S. 57, 68 (2000) (observing that "there is a presumption that fit parents act in the best interests of their children").

[182] Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (considering the state's interests in the "physical or mental health of the child [and] the public safety, peace, order, or welfare"). Public protection includes such things as the preservation of public health. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding compulsory vaccination laws).

[183] *See, e.g.*, *Prince*, 321 U.S. at 166 (stating that "the family itself is not beyond regulation in the public interest").

[184] *Yoder*, 406 U.S. at 213. The Court has characterized the state as having both "an interest" and "a high responsibility" for education. *Id.*

[185] *Prince*, 262 U.S. at 168.

[186] The Court has stated that public education "fulfills a most fundamental obligation of government to its constituency." Ambach v. Norwick, 441 U.S. 68, 76 (1979) (quoting Foley v. Connelie, 435 U.S. 291, 297 (1978)). It noted that

"[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.

the state are grounded in the presumption that their decisions are designed to protect and serve the needs of the child.

Children have their own rights that must be protected against the excesses of state or parental authority.[187] However, as the Supreme Court has cautioned, in applying constitutional principles to children's rights, courts must demonstrate "sensitivity and flexibility to the special needs of parents and children."[188] Indeed, the Court has found that "the constitutional rights of children cannot be equated with those of adults" in light of "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[189] However, even when a child lacks a current capacity, a child's right to exercise self-determination in the future deserves protection and must be considered when possible.[190]

A particularly complex balancing of these competing interests and rights has occurred when addressing legal issues surrounding adolescent sexuality. This is because minors enjoy constitutional rights, albeit with some limitations, related to access to and decisionmaking about contraception[191] and abortion,[192] as well as other important health matters.[193]

Id. at 76-78 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)) (citations omitted).

[187] Bellotti v. Baird, 443 U.S. 622, 633 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution . . . 'whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.'") (quoting *In re* Gault, 387 U.S. 1, 13 (1967)).

[188] *Id.* at 634.

[189] *Id.*

[190] *See Prince*, 321 U.S. at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.").

[191] *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 692-98 (1977).

[192] *See, e.g.*, *Baird*, 443 U.S. at 642. The politicalization of abortion probably makes it less representative of how minors' rights might generally be constructed. Currently, state abortion laws may require parental involvement or consent in the case of minors. However, the state law must also include a parental bypass procedure that can allow a minor to obtain an abortion without parental consent if she can establish that she is either sufficiently mature to make an informed decision or that the abortion is in her best interest. *Id.* at 643. Any law regulating abortion must protect a woman's right to abortion when pregnancy poses a threat to her life or health. Stenberg v. Carhart, 530 U.S. 914, 937-38 (2000).

[193] *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1974) (reviewing Georgia's procedures for voluntary commitment of children to mental hospitals).

When it comes to the issue of sexuality, the Supreme Court has explained that "the right to privacy in connection with decisions affecting procreation extends to minors as well as adults," and thus "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'"[194]

State laws frequently accord minors some relatively broad rights to make decisions related to sex.[195] States, for example, often allow teenagers, without parental approval, access to testing and treatment for sexually transmitted diseases, [196] prenatal care, [197] contraception, [198] permit decisionmaking concerning adoption and child-rearing, [199] and prohibit forced sterilization.[200] Moreover, while the age of consent has risen over the past 100 years, in the majority of states it remains below age eighteen.[201] In

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[194] *Carey*, 431 U.S. at 693 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976)).

[195] The legal landscape is more complex with regards to abortion. ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS' ABORTIONS (2005), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

[196] ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' ACCESS TO STD SERVICES (2005), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MASS.pdf.

[197] ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' ACCESS TO PRENATAL CARE (2005), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf.

[198] ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' ACCESS TO CONTRACEPTIVE SERVICES (2005), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf. According to the Institute, twenty-one states allow all minors to consent to contraceptive services, while twenty-five allow minors to consent under more limited circumstances, depending on such criteria as age, marital or parenthood status, maturity, or referral. *Id.* Four states have no laws in place. *Id.*

[199] ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' RIGHTS AS PARENTS (2005), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MRP.pdf.

[200] *See, e.g.*, H.R.S. § 560:5-602 (2004) ("Persons who are wards and who have attained the age of eighteen years have the legal right to be sterilized . . . . In no event, however, shall wards be sterilized without court approval . . . unless sterilization occurs as part of emergency medical treatment."). Issues regarding authorization for sterilization most commonly arise in the context of the mentally disabled. *See* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122 (1993); Elizabeth Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806.

[201] For an extremely comprehensive discussion of the history of the age of consent laws in the United States, see generally Cocca, *supra* note 144. Cocca observes that because statutory rape laws punish only adolescent sex outside of marriage, such restrictions are aimed "not as much on age as on marriage." *Id.* at 134.

short, even if some segments of society might prefer that minors delay sexual activity, state laws have accommodated the fact that the majority of adolescents are sexually active or will become so before majority, and recognize that decisionmaking related to sexuality should reside where possible with the individual.

Sex education thus represents a "perfect storm" of competing forces of parental rights, state interests, and children's rights.[202] In conflicts regarding the education of children, court battles have traditionally focused on the clash between the parental right to raise children and the state's interest in preparing children for their role in a democratic society, with children's rights often taking a backseat in such disputes.[203] As Barbara

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[202] Conflicts can arise between the state and parents, between the state and the child, *see, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969); between the parent and the child, *see, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 22 (2004); Field v. Palmdale Sch. Dist., No. 03-56499, 2005 WL 2861946, at *3-5 (9th Cir. Nov. 5, 2005); and between parents, *see, e.g.*, *Elk Grove*, 542 U.S. at 12.

[203] For a comprehensive discussion of a children's rights perspective, especially in the arena of education, see generally Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1050-68, 1087-91, 1113-20 (1991) [hereinafter Woodhouse, *Who Owns the Child?*]; James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); Roger J.R. Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of Law*, 4 ANN. SURV. INT'L & COMP. L. 205 (1997).

Barbara Bennett Woodhouse describes her child-centered approach as a "generist perspective." Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 321 (1994) [hereinafter Woodhouse, *Out of Children's Needs*]. This model "views an adult's relationship with children as one of trusteeship rather than as one of ownership." *Id.* Adult rights then transform into an "obligation to provide nurturing, authority to act on the child's behalf, and standing to participate in collaborative planning to meet the child's needs." *Id.*

Another children's rights perspective constructs the parental role as a child-rearing "privilege" and views parents as "agents for the child," who are able to "assert the child's rights against inappropriate state interference . . . ." Dwyer, *supra*, at 1376. Professor Dwyer argues that "a parental privilege, unaccompanied by any parental rights, would merely legally permit parents to engage in the types of behavior normally associated with child-rearing, such as housing, feeding, clothing, teaching, or disciplining a child." *Id.* at 1375.

Some critics express concern that recognizing children's rights "reduces the pressure on adults to do right by children" and urge a "return to a time when we treated children like children." MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS? 266 (2005). In the arena of sexual health matters, Guggenheim suggests that, were it not for the politicization surrounding issues related to sex and abortion, legislatures motivated by sound health policy would have allowed minors to seek abortion as the best solution under the circumstances, and that there was no need to resort to a "rights" perspective. *Id.* at 236-44.

Certain critics of both the parents' rights and children's rights constructions of family law argue for recognition of "associational respect" for the family as a way to make peace between the parental and children's rights perspectives. *See, e.g.*, DAVID J. HERRING,

Bennett Woodhouse has observed, often in conflicts concerning children, courts have unfortunately often focused on how to weigh the parents' "private property" interest in the child against the state's interest in the child as a "public resource."[204] The highly charged nature of the fight between parents and the state concerning sexual matters in particular makes it easy to neglect the distinct and significant rights of the minor in procreative and self-actualizing decisions.

Children's rights advocates argue that, with regard to issues concerning children, the conflict should not be viewed as principally one of balancing state interests against parental rights. Instead, when decisions are made about children, they should be child-centered and children's rights should not be subordinated to either state interests or parental rights. After all, the rights of both spring largely from their obligations to fulfill the needs of children.[205] It is particularly compelling to change the focus in

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THE PUBLIC FAMILY: EXPLORING ITS ROLE IN DEMOCRATIC SOCIETY 189-91 (2003); David Fisher, Note, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 430 (1997) (arguing for an "associational approach" that would protect the parent-child relationship from substantial state intrusions yet allow "breathing room for the protection of children's fundamental rights").

[204] Woodhouse, *Who Owns the Child?*, *supra* note 203, at 1117.

[205] *See* Woodhouse, *Out of Children's Needs*, *supra* note 203, at 322 (observing that children's rights paradoxically derive both from their "essential dependence" and need for protection, as well as their "claim to autonomy"). Woodhouse has charged that the seminal education-versus-parental-rights cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), exemplify a construction of the conflict that improperly subordinates the rights of children, commenting that

> our legal system fails to respect children. Children are often used as instruments, as in *Meyer* and *Pierce*. The child is denied her own voice and identity and becomes a conduit for the parents' religious expression, cultural identity, and class aspirations. The parents' authority to speak for and through the child is explicit in *Meyer*'s "right to control" and *Pierce*'s "high duty" of the parent to direct his child's destiny. . . . The minor child is a key tool of the parents' free exercise but has no independent free exercise protections.

Woodhouse, *Who Owns the Child?*, *supra* note 203, at 1114-15.

One approach to resolving the conflicts between parents, children and the state is to reconstruct the parental interest in child rearing as a parental "privilege" and couple that privilege with parental duties and obligations, rather than elevating the parental role to a constitutional right. *See* JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 62-101 (1998). As Professor James Dwyer explains in his article, *Parent's Religion and Children's Welfare*, *supra* note 203, there is a possibility for

> children's rights, rather than parents' rights, [to] serve as a basis for protecting the legal interests of children. The law should confer on parents only a child-rearing privilege, limited to actions that do not harm the child's interests. Such a privilege, coupled with a broader set of children's rights, satisfies parents' legitimate interests in child-rearing while providing children with a more appropriate level of protection than they receive under the current legal approach.

education cases from parental rights and state interests to the needs and rights of children because of the lifelong impact of educational choices on children.[206] Of all the educational curriculum decisions that ought to be child-centered, none is more compellingly so than sex education due to the heightened privacy and autonomy interests the child enjoys both now and in his or her future.

B. The Unconstitutionality of Government Funding of Abstinence-Only Curricula

When one puts the minor's interests first, the prerogative of the government to singularly teach abstinence, even if shorn of Establishment Clause implications, rests on shaky constitutional grounds.[207] These

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Id. at 1371.

[206] Professor Woodhouse contends that "in education . . . an overemphasis on the rights of parents kept American law from moving into the twenty-first century and embracing children's rights as human rights." Barbara Bennett Woodhouse, Keynote Address, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own"*, 11 CORNELL J.L. & PUB. POL'Y 481, 485 (2002). Drawing on the autobiography of Frederick Douglass, she comments on the power of education, stating that "we confront the lifelong enslavement that can follow when adults are empowered to deprive children of education." *Id.* at 486.

[207] Other potential constitutional infirmities are beyond the scope of this Article but are worth noting. First Amendment free speech jurisprudence recognizes a right to receive information, and court rulings have considered the legal parameters of state limitations on students' access to information. To the extent that abstinence-only education is the only sex education minors can obtain in some schools and communities, and given the compulsory nature of education and the lack of other avenues to obtain other information, the right to free speech under the First Amendment may be implicated. *See* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 227-42 (1999) (exploring the constitutional parameters of a minor's right to receive information). In addition, the First Amendment rights of grantees may also be implicated. *See* McGrath, *supra* note 122, at 690-96 (arguing that even after Rust v. Sullivan, 500 U.S. 173 (1991), SPRANS-CBAE funding places an unconstitutional condition on the recipient's protected speech rights).

Moreover, *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), implies that the affirmative acts of providing false and misleading information about condoms and contraception effectiveness and promoting educational programs that prove harmful to the well-being of minors may violate the Due Process Clause. In *DeShaney*, the Court drew a sharp distinction between omissions and commissions under the Due Process Clause, observing that the Constitution does not require the state to protect individuals from dangers "when [the state] played no part in their creation, nor did anything to render [a person] more vulnerable to them." *Id.* at 201. "In the substantive due process analysis, it is the State's affirmative act . . . which is the 'deprivation of liberty' . . . not [the state's] failure to act to protect [a person's] liberty interests against harms inflicted by other means." *Id.* at 200. *See also* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1139 (2005) (describing bases for affirmative acts and special relationship liability under the Due Process Clause). While the state may not

curricula impair the rights mature adolescents possess in matters concerning their own sexuality and exceed the government's right to promote its own message over others. By omitting or distorting information about sex and sexual health, including the efficacy of contraception, the consequences of abortion, and methods of disease acquisition and prevention, including specifically pertinent information for those youth that belong to sexual minorities,[208] it is as though these programs have embarked on a scheme to prevent minors from making informed choices about rights the law has long accorded them. It is here that these programs cross the line of constitutionality.

There are well-established limits to the authority of the government to control adolescent procreative rights generally. As established in *Carey v. Population Services International*,[209] "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults," and thus laws that impair adolescents' privacy rights are "valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'"[210] *Carey*, decided over two decades ago, remains illustrative of the scope of a minor's procreative rights.[211] The case considered the validity of

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have an obligation to provide sex education, once it affirmatively undertakes this role, it could be liable for the resulting harm inflicted on minors. Recently, several organizations opposing abstinence-only education have challenged, on statutory grounds, federal funding for programs providing false and inaccurate information. Press Release, Advocates for Youth, Groups File Legal Complaint against Government for Spreading False and Misleading Sex Education (Sept. 13, 2005), *available at* http://www.advocatesforyouth.org/news/press/091305.htm.

[208] James McGrath has argued that, by ignoring sexual minority youth, abstinence-only programs are discriminatory. McGrath, *supra* note 122, at 681-84. He notes that under *Lawrence v. Texas*, 539 U.S. 558 (2003), sexual minorities enjoy constitutionally protected liberty interests in their intimate relations. *Id.* at 682. Although, as he acknowledges, *Lawrence* issued an express caveat that the case did not address minors, McGrath posits that sexual minority youth will enjoy a future right, as adults, to intimate contact, which abstinence-only education programs ignore. *Id.* at 684. He therefore argues that abstinence-only education programs "deny the rights of gay and lesbian adolescents to receive equal protection under the law . . . ." *Id.* at 684.

[209] Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

[210] *Id.* at 693 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976)).

[211] Cases regarding a minor's right to abortion, particularly with respect to parental notification and consent laws, have seen a gradual erosion since the Court first considered a minor's right to abortion in *Danforth*, 428 U.S. at 72-75. *See, e.g.*, Lambert v. Wicklund, 520 U.S. 292, 293-99 (1997); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899-900 (1992). However, as the Court in *Carey* observed, the state's interests are less when it comes to access to contraception than its interests in the health of the minor and the potential life implicated in abortion cases. Presumably, this should also apply to the regulation of information about contraception. The Court explained that "[t]he State's interests in

a New York law that restricted the distribution of contraceptives to minors less than 16 years of age.[212] New York argued that the law was intended to regulate "the morality of minors" and deter "promiscuous intercourse among the young,"[213] but the Court held that the law impermissibly burdened a minor's right to obtain contraception and, most notably, did not rationally serve to accomplish a significant state interest.[214]

The justifications offered by New York in *Carey* for its restrictions on minors' access to contraception are remarkably similar to those which proponents of abstinence-only education offer today for restrictions on providing sex information to adolescents. New York claimed that access to contraception might promote adolescent sexual promiscuity; similarly, proponents of abstinence-only education claim that information about contraception might encourage licentious behavior.[215] The *Carey* Court was astutely dubious of that justification in the absence of any proof:

> [T]here is substantial reason for doubt whether limiting access to contraceptives will in fact substantially discourage early sexual behavior. Appellants themselves conceded . . . that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives," and accordingly offered none . . . . Appellees, on the other hand, cite a considerable body of evidence and opinion indicating that there is no such deterrent effect. Although we take judicial notice, as did the District Court, that with or without access to contraceptives, the incidence of sexual activity among minors is high, and the consequences of such activity are frequently devastating, the studies cited by appellees play no part in our decision. It is enough that we again confirm the principle that when a State, as

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protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive." *Carey*, 431 U.S. at 694. With regard to abstinence-only education, it is hard to conceive of any legitimate state interest in protecting the mental and physical health of a minor that is served by providing false or incomplete reproductive health information that could impair the adolescent's ability to make informed procreative choices and harm their health. Furthermore, although *Carey* was a plurality decision, it "remains untouched, and numerous subsequent cases have affirmed its principles." Jessica R. Arons, *Misconceived Laws: The Irrationality of Parental Involvement Requirements for Contraception*, 41 WM. & MARY L. REV. 1093, 1096 (2000).

[212] The statute prohibited "[a]ny person [from] sell[ing] or distribut[ing] any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years . . . ." *Carey*, 431 U.S. at 681 n.1.

[213] *Id.* at 692.

[214] *Id.* at 696-98.

[215] *See supra* notes 127-128 and accompanying text.

> here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.[216]

Just as New York could not rely on a bare assertion that access to contraception might encourage promiscuity, proponents of abstinence-only should not be able to depend on a vague and unsubstantiated claim that information about sex will encourage sexual activity.

New York also argued that, because minors could obtain contraceptives from physicians, the statute did not significantly burden a minor's privacy interests.[217] The Court rejected the assertion, explaining that, even though the statute did not amount to a total prohibition on distribution of contraception to minors, it nevertheless constituted a significant burden on the right to decide whether to bear children.[218] Finding "no medical necessity for imposing a medical limitation on the distribution of nonprescription contraceptives to minors," the court determined the law constituted a significant burden on a minor's right "to decide whether to bear children."[219]

Abstinence-only education impairs a minor's decisional interests just as significantly as New York's contraception ban did in *Carey*. Proponents of abstinence-only education defend the curricula, arguing in part that there are other avenues available for minors to obtain more comprehensive information.[220] However, for some minors, there is no other avenue.[221] In states that rely exclusively on money from federal abstinence-

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[216] *Carey*, 431 U.S. at 695-96 (quoting Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 332 (S.D.N.Y. 1975)) (internal citations omitted).

[217] *Id.* at 697-99.

[218] *Id.*

[219] *Id.* at 697.

[220] *See* Melissa G. Pardue et al., *Government Spends $12 on Safe Sex and Contraceptives for Every $1 Spent on Abstinence*, THE HERITAGE FOUNDATION, Jan. 13, 2004, *available at* http://www.heritage.org/Research/Family/bg1718.cfm (detailing various comprehensive sex education and contraception promotion programs).

[221] Landry et al., *Abstinence Promotion*, *supra* note 95, at 286 (estimating that "more than one-third of districts with a policy to teach sexuality education require that abstinence be taught as the only option outside of marriage . . . ."). For these minors, there is no alternative forum, which raises First Amendment issues. McGrath, *supra* note 122, at 690-96 (arguing that SPRANS-CBAE effectively prevents there being any real alternative setting for comprehensive education, and that the program therefore violates the First Amendment).

only education funds to teach sex education, a minor's constitutionally protected privacy interests in obtaining information about procreative choices may be significantly burdened because he or she may lack access to other outlets to obtain information.[222]

However, even if one conceded both that the government has no obligation to fund any sex information and that all minors might obtain information elsewhere, such as through alternative school programs, family, friends, or health care providers, the ability of any minor who undergoes abstinence-only sex education to make informed decisions concerning sex is nonetheless significantly hampered both by what abstinence-only education teaches and what it omits. Since participants are erroneously instructed, for example, that abstinence is the only effective way to prevent disease and conception, and are not taught that contraception and condom use are effective methods of avoiding pregnancy and disease, they are burdened by erroneous instruction. Even where other sources of information are available, these students are unlikely to appreciate that they should and could seek more comprehensive sex instruction from a more reliable source. After all, a young person will very likely view a teacher working under the auspices of a program funded by the federal government as reliable and honest.

Moreover, as in *Carey*, the state interest in current abstinence-only education policy is not justified as a rational means to accomplish a significant state policy.[223] First, the goal of preparing minors to responsibly assume a proper position in democratic society, which underlies the state's interest in education, is not served by a singular focus on abstinence.[224]

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[222] The captive and compulsory nature of classroom instruction compounds the problem when schools teach abstinence-only curricula. Although there may be other potential avenues to obtain information, the classroom is the main formal educational source of sex education. While some minors may have access to information at home or through health care providers, for some, school sex education will be the only avenue to obtain formal instruction about sex. Not everyone has access to the Internet, libraries, or news media, and some parents actively block their children from accessing reliable sex-related information.

[223] *Carey*, 431 U.S. at 696.

[224] As Mark Yudof warns:

> Inevitably, government, or those who are part of it, seeks to persuade citizens to act, or to allow it to act differently than they would have without the information supplied by government. The transfer of information thus becomes a policy tool. The obvious danger is that government persuaders will come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what makes them accede to government's plans, policies, and goals.

MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 6 (1983). *Accord* Stanley Ingber, *Socialization, Indoctrination, or*

Shaping values in education by withholding knowledge and information is antithetical to public education's purpose of preparing youth to make the weighty choices and decisions expected of America's citizenry.[225] This is especially true given that "[o]ur social ideal is a democratic education, one that both prepares our young to choose for themselves and teaches them that their freedom to do so hinges on their respect and tolerance of the freedom of others to choose differently."[226]

Second, the purpose of sex education is not merely to prepare adolescents to assume a future role as a sexual responsible adult in a democratic society. Biological and psychological realities dictate that sex education must educate minors to act responsibly now, and so teaching about sex cannot be postponed until adulthood. Sex education, because of its relationship to a minor's present health and reproduction rights, necessarily stands on a different footing than more mundane curricular choices, and for this reason the scale must tip in favor of the minor's right to comprehensive sex education. In matters of sexuality, mature adolescents have the capacity to engage in and make choices concerning sexual activities, and thus possess corresponding autonomy and privacy interests.[227] Because adolescents are sexually mature at the time that sex education is presented to them, the minor's right to information is no less than that of an adult's.[228]

State laws have vested in adolescents the right to make certain decisions regarding their sexual activities, and therefore the right to information logically inures to them.[229] In the medical setting, a corollary of the right to consent is the right to receive adequate information to make an informed choice, which resides with the decision-maker. [230] However,

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the "Pall of Orthodoxy": Value Training in the Public Schools, 1987 U. ILL. L. REV. 15, 20-40.

[225] The potential of government to abuse the educational process and the dangers of a heavy-handed control of viewpoints is that it renders youth incapable of assuming adult autonomy. Ingber, *supra* note 224, at 19-20; Yudof, *supra* note 224, at 52-55.

[226] Yudof, *supra* note 224, at 55.

[227] *See* Seiler, *supra* note 85, at 33-40.

[228] Catherine Ross advances the argument that "teenagers have a right to knowledge despite their parents' objections" based on their "autonomous liberty interests that cannot be exercised meaningfully without access to information conveying a variety of viewpoints." Ross, *supra* note 207, at 224-25.

[229] *Id.* at 250-64 (arguing that a minor's autonomy rights extend to a right to receive information to make informed decisions).

[230] *See, e.g.*, Lounsbury v. Capel, No. 910584-CA, 1992 Utah App. LEXIS 123, at *28-29 (July 17, 1992).

abstinence-only education only teaches minors to say "no," ignoring the concomitant right to knowledgably say "yes." Mature minors who are both physically and legally entitled to make sexual and reproductive decisions have a right to adequate information to make informed choices. Although sex education is conceptually different than medical treatment, it touches upon similarly private concerns related to autonomy.[231] This is a crucial point, as adolescents are an underserved medical population, and thus formal sex education may provide the only forum through which teenagers might receive sexual health information.[232]

Third, there can be no legitimate interest in affirmatively and deliberately misleading, deceiving, or depriving adolescents of health information[233] when doing so might expose them to grave harms.[234] Indeed, no one has offered a justification for delivering misleading, deceptive, and ineffective information about this important life topic.[235] Further, requiring

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[231] In *Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 978 F. Supp. 197, 207 (E.D. Pa. 1997), *aff'd*, 148 F.3d 260 (3d Cir. 1998), a case challenging a school condom distribution program, the district court noted that, while condom distribution is health related, it is not medical treatment.

[232] *See* Amitai Ziv et al., *Utilization of Physician Offices by Adolescents in the United States*, 104 PEDIATRICS 35, 40-41 (1999) (noting that adolescents underutilize primary care and are more likely to be uninsured than other age groups).

[233] The Court has not addressed whether the state ever could have a legitimate, rational interest in teaching misleading or deceptive information; however, it has recognized that a state decision *not* to teach a topic for an impermissible purpose is unconstitutional. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court struck down an Arkansas statute that forbade teaching evolution, finding that it violated the Establishment Clause. The Court observed that "[t]he overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine . . . ." *Id.* at 103. *See* Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1631-33 (1995) (opining that, while the "[c]ourts have not addressed directly the theory that inaccurate or misleading information violates the freedom of speech and the right to receive information," such a right is inherent in light of the purposes of democratic education and First Amendment interests in access to information). There are also issues involved in a state's requiring teachers to violate professional standards and ethics by misleading students. *See infra* note 236 and accompanying text.

[234] For a discussion of a state's liability under the Due Process Clause when creating or rendering a person more vulnerable to a danger or harm, see *supra* note 208 and accompanying text.

[235] In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that the government does not violate the constitution by prohibiting physicians and clinics from using Title X family planning funds to counsel about abortion. Yet, the Court suggested that government action that *misleads* might be problematic:

teachers to engage in such negative behavior forces educators to violate the educator's code of ethics.[236]

C. Limitations on the Dissemination of Information to Minors

Admittedly, schools enjoy broad discretion in determining what to teach, and the federal government has similar authority to decide what programs it will and will not fund and endorse. In keeping with public education's role in the preservation of a democratic society, the Court has accorded schools broad latitude to maintain order and discipline,[237] "make content-based choices,"[238] and establish its own curriculum.[239] Moreover, the Supreme Court has not held that minors enjoy a fundamental right to an

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It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. *The program does not provide post conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.*

Id. at 200 (emphasis added).

[236] The National Education Association Code of Ethics calls on teachers not to distort or suppress subject matter. NATIONAL EDUCATION ASSOCIATION, CODE OF ETHICS OF THE EDUCATION PROFESSION: PRINCIPLE 1.3 (1975), *available at* http://www.nea.org/aboutnea/code.html.

[237] *See, e.g.*, New Jersey v. T. L. O., 469 U.S. 325, 342 n.9 (1985) (observing that courts should give deference to schools in establishing rules to keep order and discipline in the schools).

[238] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

[239] *See, e.g.*, Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869 (1982) (distinguishing the "unique role of the school library" from other curricular choices and noting broader "discretion in matters of curriculum" based on the school's "duty to inculcate community values").

Like abstinence-only education, the intelligent design movement raises obvious First Amendment issues and has Establishment Clause implications. *See, e.g.*, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 342-48 (5th Cir. 1999). But, as with abstinence-only education, children deserve our consideration of a more fundamental question: whether the state has a rational interest in compelling instruction in unfounded and unsupported theories that can outweigh a child's interest in a sound education.

education, let alone a particular quality of education.[240] Furthermore, under *Rust v. Sullivan*,[241] the state may "enlist . . . private entities to convey its own message" and to "promote a particular policy of its own" through the appropriation of public funds.[242]

There are limits, however, to the authority of government to promote its policies and convey its messages. Therefore, while the state could have chosen to remain silent about sexual activities, or even simply funded programs that extolled abstinence, funding the dissemination of false and distorted information that prevents minors from making informed choices regarding the rights they possess certainly exceeds its authority. The state's right to convey its own message may not be had at the expense of a minor's decisional and privacy rights in matters of their own sexuality. *Rust v. Sullivan* acknowledges that such limitations likely exist. In *Rust*, plaintiffs challenged federal restrictions on Title X family planning grantees to provide abortion counseling and referral both on First Amendment and Due Process grounds.[243] As to the latter claim asserted on behalf of patients,

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[240] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). The Court noted that

> [e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a state's social and economic legislation.

Id. at 35. Plyler v. Doe, 457 U.S. 202, 223 (1982) ("Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.").

However, in *Plyler*, the Court struck down a Texas statute denying local schools funding for the education of illegal aliens and authorizing schools to deny enrollment to such children, finding that the Texas law

> imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.

Id. at 223. Therefore, the Court held that the law would not "be considered rational unless it furthers some substantial goal of the State." *Id.* at 224. It thereafter held that, even if Texas' interests were "legitimate," they were not sufficiently substantial. *Id.* at 230. *See also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting) (citing state constitutional provisions guaranteeing students a free primary and secondary education).

[241] Rust v. Sullivan, 500 U.S. 173 (1991).

[242] *Rosenberger*, 515 U.S. at 833 (interpreting Rust v. Sullivan).

[243] *Rust*, 500 U.S. at 181.

the Court reiterated the proposition that the "[g]overnment has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical services relating to childbirth but not to those relating to abortion."[244] In affirming the restriction, the Court determined that the constraint did not impermissibly burden Due Process rights because it left women "with the same choices as if the government had chosen not to fund family-planning services at all."[245] Within the context of the First Amendment challenge, however, *Rust* suggested that government restrictions on speech about abortion that interfered with the doctor-patient relationship by creating misleading impressions would stand on a different footing.[246] Implicit in *Rust*, then, is the principle that, when government programs restrict information that might not otherwise be obtained or affirmatively mislead and thus impair an individual's ability to exercise fundamental rights, such programs are unconstitutional.

Abstinence-only curricula do not leave minors in the same position they would have been in had the government chosen to remain out of the business of sex education, as the curricula have extremely negative influences. They are designed to instill fear about sex, distort health information, denigrate any but heterosexual and marital sex, and are intended to and actually do have an adverse affect on the procreative and health decisional rights society has accorded to mature minors. An informed teenager can make informed procreative and related choices; an ignorant adolescent can take it upon him or herself to become educated. However, a minor who erroneously believes that a reliable teacher has provided sound instruction will assuredly make poorly informed choices. Thus, these curricula are insidiously more harmful than merely teaching nothing about sex, and therefore do not leave adolescents in the same position they would be otherwise. Consequently, funding abstinence-only curricula exceeds the governmental right to subsidize certain messages over others, as it impairs minors' privacy interests in making procreative and other choices without advancing a significant state interest.

V. CONCLUSION

Federal sponsorship of abstinence-only education impairs the constitutional rights minors enjoy with respect to their sexual health and

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[244] *Id.* at 201 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 507 (1989)).

[245] *Id.* at 202.

[246] *Id.* at 200.

procreation decisions. Abstinence-only education's singular focus on abstinence, and its distortions concerning the effectiveness of methods of contraception and disease prevention, the risks associated with abortion, and the other consequences of sex misleads minors and compromises their ability and right to make informed health decisions. Indeed, recent studies suggest that abstinence curricula put minors at greater health risk than they would have been had they not taken any sex education course at all.[247] Adolescents who have undergone abstinence-only education and who later engage in coital and non-coital activity, as most will prior to marriage, are ill-prepared to protect themselves; they may not use a condom because they do not know how or because they mistakenly believe that condoms are ineffective,[248] may be unaware of the risks they experience when engaging in non-coital sexual activity as a strategy to remain "abstinent,"[249] and may be more vulnerable to adverse consequences of unprotected sex because they have not rehearsed and otherwise prepared for the contingency that they will not always be abstinent. Thus, by teaching abstinence as the only effective method to prevent disease and pregnancy, these curricula necessarily fail those adolescents who will hear, but not completely heed, that message. Therefore, federally funded abstinence-only education impairs a minor's ability to make informed choices and therefore impermissibly burdens his or her privacy and autonomy interests.

In light of the potential health risks associated with these curricula, abstinence-only education cannot be justified as intending to serve any significant state interest. While the government may have an interest in encouraging abstinence in unmarried youth, its current policy is being pursued at the expense both of truth and public health. Importantly, there is no evidence that providing comprehensive sex education promotes increased sexual behavior or dilutes the message that abstinence is a preferable choice, as proponents assert.[250] Furthermore, the government's singular focus on abstinence represents an educational policy that is inconsistent with the democratic educational objective of preparing adolescents to make responsible, informed choices.

Adolescents are sexually mature beings—a biological fact that cannot be ignored. Our constitutional jurisprudence and state laws related to decisionmaking about childbearing, contraception, treatment of sexually transmitted diseases, and prenatal care accord minors crucial autonomy and privacy rights in recognition of that biological maturity. Sex education too must recognize that sexually mature and maturing adolescents are entitled

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[247] *See supra* notes 139-151 and accompanying text.

[248] *See supra* note 145 and accompanying text.

[249] *See supra* note 138 and accompanying text.

[250] *See supra* notes 126-129 and accompanying text.

to accurate and honest information that respects their sexual needs and rights.