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# EDUCATING OUR FUTURE: AN ANALYSIS OF SEX EDUCATION IN THE CLASSROOM

*Michael J. Fucci\**

## I. INTRODUCTION

If you discovered your child had taken up cigarette smoking, how would you respond? Would you simply accept it as typical teenage behavior and supply him with the safest brand of cigarettes available—those lowest in tar and nicotine—or would you respond in a manner that would relate to your child that smoking can cause serious diseases and even death? What if you found out your newly licensed teenage child was drinking alcohol? Would you check that off as “just stuff that teenagers do” and supply him with the safest car possible . . . just in case he decides to drive home from a party drunk?

Although these scenarios may sound silly at first, they employ much of the same logic that many parents and schools use when it comes to issues involving teenagers and sex. How many times have you heard the adage: “Kids are going to have sex; it’s better that they are protected and practice safe sex.” Safe sex? What does that mean? In today’s society, it is an unfortunate truth that safe sex has become somewhat of an oxymoron. Sex in the 1990s can be debilitating and even deadly. Further, sexually active teenagers face serious emotional issues as well. The fact remains, however, that no matter what method one uses to “protect” oneself, nothing—aside from abstinence—can assuredly prevent one from catching sexually transmitted diseases or from becoming pregnant.

As the status of sex has changed throughout the past century, so has sex education in schools. Before the turn of the twentieth century, education involving sex and human sexual-

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ity was limited to "social hygiene."<sup>1</sup> Such education included information about venereal diseases, physical growth, and human reproduction.<sup>2</sup> It was not until 1912, when the International Congress of Hygiene recommended a broader study of the topic, that the term "sex education" was adopted.<sup>3</sup>

In the 1920s, sex education programs were generally created in order to combat the increasing social problem of teenage pregnancy.<sup>4</sup> Nonetheless, parents maintained a liberty interest to direct the upbringing of their children;<sup>5</sup> thus the reach of such sex education programs was sufficiently limited.

Today, the study of human sexuality encompasses much more than ever could have been anticipated in the early 1900s. Examples of these modern, more progressive sex education programs are readily apparent throughout the country. One example of these more controversial programs is the sex education program entitled *Hot, Sexy, and Safer*, presented by Suzi Landolphi<sup>6</sup> and her colleagues<sup>7</sup> at over 1,000 school campuses.<sup>8</sup> The controversy surrounding the Landolphi's *Hot, Sexy and Safer* programs is evidenced in *Brown v. Hot, Sexy, and Safer Prods.*<sup>9</sup> A similar program in New York involved explicit in-

1. See Debra W. Haffner, *Sex Education* (visited Nov. 11, 1999) <<http://encarta.msn.com/encarta.Contents.asp?z=2&br=0&pg=2&ti=04A83000>>.

2. See *id.*

3. See *id.*

4. See Donald Schoemaker, *Sex Education: The Dissemination of Family Planning Services and Contraceptives in Public Schools*, 8 J. LEGAL MED. 587, 596 (1987) ("In the early 1920s, more than 40% of high schools provided some kind of sex education.").

5. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

6. Suzi Landolphi has been involved in regional theatre and has formed two professional theatre companies. Additionally, she has received national recognition for video and film production/direction. While working on her sex education program, *Hot, Sexy, and Safer*, Landolphi hosted a radio show and has worked as a sex and relationship correspondent. See *Who's Suzi* (visited Nov. 12, 1999) <<http://www.thirdage.com/loveseat/bio.html>>.

7. The *Hot, Sexy, and Safer* program was originally developed by Suzi Landolphi. She has since trained others, including Maria Falzone, a stand-up comedian, to spread the message of the program. See *Wilkes University Welcomes Maria Falzone* (visited Nov. 10, 1999) <<http://www.wilkes.edu/WilkesDocs/UnivRel/U.../WilkesUniversityWelcomesMa.htm>>.

8. See *id.*

9. 68 F.3d 525, 529 (1<sup>st</sup> Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996) (describing a complainant alleging that Landolphi gave sexually explicit monologues and participated in sexually suggestive skits with several minors chosen from the audience during a mandatory school-wide assembly at Chelmsford High School).

formational materials that were distributed to children in the New York Public School System.<sup>10</sup>

These programs represent an expanded view of sex education that has been the basis of great controversy. Many parents do not condone their child having sex and do not want their child to participate in a sex education program that accepts sex as normal, acceptable teenage behavior. Furthermore, many religious groups, most notably the Catholic Church, have expressed disapproval towards the expanding nature of sex education curricula.<sup>11</sup> Ultimately, the controversy is twofold. First, controversy arises over the role of parents and schools in the upbringing of children. Second, opponents to these expanding sex education curricula—citing recent statistics—argue that such programs are ineffective in achieving their goals of preventing sexually transmitted diseases and teenage pregnancies.

Part II of this comment begins by examining the role of parents in the upbringing of their children, and discusses many of the court cases that have defined this role. This section will examine the balancing of interests and rights of parents, children, and the State (i.e., the school). Part III examines the effectiveness of these bolder sex education programs in schools throughout the past several decades. This section also includes information and statistics regarding sexually transmitted diseases and teenage pregnancy rates throughout the second half of the twentieth century. Condom distribution in schools and the push for abstinence-based curricula will also be examined. Ultimately, this section will identify the most common goals of sex education curricula and examine whether sex education has been successful in reaching these goals. Finally, Part IV proposes a model sex education curriculum for public schools. The proposed model takes into account the interest of parents, children, and schools. This section provides information per-

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10. See William Tucker, *Revolt in Queens*, AM. SPECTATOR 23 (Feb. 1993) ("All of the following are from educational materials which were distributed in 1993 to children in the New York City public school system: The Teenager's Bill of Rights: I Have the Right to Decide Whether To Have Sex and Who to Have It With. I Have the Right to Use Protection When I Have Sex. I Have the Right to Buy and Use Condoms."). *Id.* at 26.

11. See CATECHISM OF THE CATHOLIC CHURCH 2252 (English Ed.) ("Parents have the first responsibility for the education of their children in the faith, prayer, and all the virtues. They have the duty to provide as far as possible for the physical and spiritual needs of their children."). See also *id.* at 2223, 2225-26, 2228-29.

taining to parental concerns regarding sex education, including parental challenges to sex education curricula.

## II. BALANCING THE INTERESTS OF PARENTS, CHILDREN, AND THE STATE

What is in the best interest of parents, children, and schools regarding offering sex education in schools? This question has proven to be quite controversial. Although these three entities have legitimate concerns and interests about the availability of sex education in schools, their concerns and interests are frequently in conflict with each other. Conclusively, the debate over offering sex education in schools and the extent to which such programs should be implemented and administered remains strong today.

The Supreme Court has frequently addressed issues that involve balancing the interests of parents, students, and schools. Although the Court has yet to examine the balancing of these interests in the context of sex education directly, many of its prior decisions have great relevance. For example, the Court has specifically addressed the rights of parents to direct the upbringing of their children. Additionally, it has addressed the student's right to freedom of thought and expression. Further, the Court has attempted to reconcile parents' and students' rights with the rights of schools to make educational and administrative decisions.

The Court's attempt to reconcile these conflicting interests has great relevance to the controversy of offering sex education in schools. Accordingly, as the views of the Court have continued to develop, so have the sex education curricula in schools. In the early part of this century, the Court's decisions tended to support the belief that parents ultimately had the right to direct and shape the upbringing of their child.<sup>12</sup> By the early 1940s, the Court began emphasizing the student's right to freedom of thought and expression.<sup>13</sup> It was at this point that sex education classes began to emerge as accepted curriculum in many schools.

The focus on the student's rights soon shifted to a more di-

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12. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). See also *Meyer v. Nebraska*, 262 U.S. 390 (1923).

13. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

rected focus on the rights of schools to influence and direct the behavior of students. By the 1980s, schools had gained great momentum in their capacity to make educational, administrative and curriculum-based decisions.<sup>14</sup> These decisions have greatly supported the already increasing presence of sex education as a regular part of school curriculum.

### *A. The Rights of Parents*

Until the latter part of the nineteenth century, parental authority was close to absolute and legal supervision was minimal.<sup>15</sup> Parents had sole discretion as to the level of education their child should receive and at what point their child would begin working to help financially support the family.<sup>16</sup>

With the influx of immigrants during the turn of this century, State involvement in the family began to emerge. The creation of child protection laws, the juvenile court system, and free public education are just a few of the programs that contributed to State involvement in the family unit. Such programs were developed fundamentally for the welfare of children. However, because these types of programs usurped many parental freedoms, questions regarding the appropriate level of governmental involvement arose.

In response to parental concerns, many cases involving the rights of parents in directing the upbringing of their children have emerged over the past century. Four cases, in particular, provide a foundation with respect to the balancing of rights between parents and the State.<sup>17</sup> These cases also serve as the basis for many contemporary claims by parents seeking to control the level and nature of sex education their child receives in school.

#### *1. Meyer v. Nebraska*

In 1923, the Supreme Court recognized, for the first time,

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14. See *Board of Educ. v. Pico*, 457 U.S. 853 (1982). See also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

15. See SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM* 13 (2d ed. 1997).

16. See *id.*

17. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

that a parent has a right to direct the upbringing of their child. This decision, *Meyer v. Nebraska*,<sup>18</sup> indicates that parental authority to establish a home and raise children is protected by the due process clause of the Fourteenth Amendment.<sup>19</sup>

At issue in *Meyer* was a 1919 Nebraska statute that prohibited the teaching of any language other than English to students who had not yet passed the eighth grade.<sup>20</sup> Robert T. Meyer, an instructor at Zion Parochial School, violated the statute by unlawfully teaching German to a ten-year old child, who had not completed the eighth grade.<sup>21</sup> Reversing the Nebraska Supreme Court's ruling, the United States Supreme Court stated that the Fourteenth Amendment protected a parent's liberty interest to raise their child as they see fit.<sup>22</sup> Specifically the Court stated:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly

18. 262 U.S. 390 (1923).

19. See U.S. CONST. amend. XIV, §1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

20. The *Meyer* Court set forth the Nebraska statute, approved in April 9, 1919, as follows:

Sec. 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100) or be confined in the county jail for any period not exceeding thirty days for each offense.

Sec. 4. Whereas, [if] an emergency exists, this act shall be in force from and after its passage and approval.

*Meyer*, 262 U.S. at 397 (quoting 249 Neb. Stat. Secs. 1-4).

21. See *Meyer*, 262 U.S. at 396-97.

22. See *id.* at 399.

pursuit of happiness by free men.<sup>23</sup>

Conclusively, the Court stated that the Nebraska legislature, through enactment of the 1919 statute, "interfere[d] with . . . the power of parents to control the education of their own."<sup>24</sup>

In the context of sex education, *Meyer* is an important decision for parents who question or even disagree with schools providing children with information about sex and human sexuality. *Meyer* establishes, essentially, that it is a parent's right to raise his or her child. Many parents and commentators have interpreted the Court's decision to include a parent's right to control and monitor the information a child receives from a school-sponsored sex education program.

## 2. *Pierce v. Society of Sisters*

Roughly two years after *Meyer* the Supreme Court, in *Pierce v. Society of Sisters*,<sup>25</sup> further examined the liberty interest of parents to direct the upbringing of their child. Being challenged was the Oregon Compulsory Education Act,<sup>26</sup> adopted

23. *Id.*

24. *Id.* at 401. It is also important to note that in addition to finding that the liberty interests of parents were violated by the statute, the Court also addressed the right of instructors to pursue their profession. Specifically, the Court noted that the Nebraska legislature "attempted materially to interfere with the calling of modern language teachers . . ." *Id.* at 401.

25. 268 U.S. 510 (1925).

26. 1922 Or. Laws 8-10. The Oregon Compulsory Education Act reads as follows:

Be it enacted by the people of the State of Oregon:

Section 1. That Section 5259, Oregon Laws, be and the same is hereby amended so as to read as follows:

Sec. 5259. Children between the ages of eight and sixteen years. Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools:

(a) Children physically unable. Any child who is abnormal, subnormal or physically unable to attend school.

(b) Children who have completed the eighth grade. Any child who has completed the eighth grade, in accordance with the provisions of the State course of study.

(c) Distance from school. Children between the ages of eight and ten years, inclusive, whose place of residence is more than 1 ½ miles, and children over ten years

in 1922, which required every parent, guardian or other person, having control, charge, or custody of a child between eight and sixteen years of age, to send the child "to a public school for the period of time a public school shall be held during the current year in the district where the child resides . . . ." <sup>27</sup> Any failure to follow the Act was a misdemeanor.<sup>28</sup>

The state enforced this statute against two non-public institutions, the Society of Sisters, a Catholic school, and Hill Military Academy. In rendering its decision, the Court carefully considered the rights of parents, children, and schools. Specifically, it examined "the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parent's choice of a school, [and] the right of schools and teachers therein to engage in a useful business or profession . . . ." <sup>29</sup>

Ultimately, the Court cited the doctrine established in *Meyer* and concluded that the 1922 Act "unreasonably interfere[d] with the liberty interest of parents and guardians to direct the upbringing and education of children under their control."<sup>30</sup> Under the rubric of the Fourteenth Amendment, the

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of age whose place of residence is more than 3 miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) Private instruction. Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than \$ 5, nor more than \$ 100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This act shall take effect and be and remain in force from and after the 1<sup>st</sup> day of September, 1926.

*Pierce*, 268 U.S. at 530-31 n.\*.

27. *Pierce*, 268 U.S. at 530.

28. *See id.*

29. *Id.* at 532.

30. *Id.* at 534-35.

Court confirmed the liberty interest of parents to raise their children as they see fit. "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>31</sup>

Like *Meyer*, *Pierce* was a victory for parents. It too, supported parents' rights to determine the nature of sex education, which a child under their control should receive. Focusing heavily on the Court's language that "[t]he child is not a mere creature of the state . . ." <sup>32</sup> parents can effectively argue, under *Pierce*, that they have the right to direct their child's upbringing as they deem appropriate.

### 3. *Farrington v. Tokushige*

Approximately two years after *Pierce* was decided, the Court faced another case involving the determination of rights of parents and schools. In *Farrington v. Tokushige*,<sup>33</sup> the Court faced a Hawaiian statute that effectively banned private after-school classes that were taught in Japanese and included subject matter regarding the Japanese language and culture. Under the analysis established in *Meyer* and *Pierce*, the Court ultimately held that the statute unreasonably impinged upon a parent's right and ability to direct and control the upbringing of their children. With *Farrington*, parents were again given more ammunition to fight the upcoming conflict determining the type of sex education their children should receive.

### 4. *Prince v. Massachusetts*

Despite the establishment of the parental liberty interest via the Court's rulings in *Meyer*, *Pierce*, and *Farrington*, parents do not enjoy unlimited freedom concerning their children's education. In a critical 1944 decision, the Court upheld limitations to the parental liberty interest. In *Prince v. Massachusetts*,<sup>34</sup> Sarah Prince, a Jehovah's Witness, was held in violation of sections 80 and 81 of the Massachusetts' Child Labor Law,<sup>35</sup> by allowing a nine year-old girl under her guardianship

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31. *Id.* at 535.

32. *Id.*

33. 273 U.S. 284 (1927).

34. 321 U.S. 158 (1944).

35. MASS. GEN. LAWS ANN. ch. 149, §§ 80, 81 (West 1996). Sections 80 and 81, so

to distribute religious magazines.

The guardian argued that the Massachusetts' Child Labor Law violated her liberty interest and prevented her from raising her child as she saw fit—which included teaching the child the practices of her religion. After citing the liberty interest as established in *Meyer* and *Pierce*, the Court ultimately determined that “neither rights of religion nor rights of parenthood are beyond limitation.”<sup>36</sup> The Court continued that “[a]cting to guard the general interest in youth’s well-being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”<sup>37</sup>

The Court qualified its decision by stating that “when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child’s protection against some clear and present danger . . . .”<sup>38</sup> Further, the Court noted that its decision does not extend beyond the facts of the case at hand:

We neither lay the foundation “for any [that is, every] state intervention in the indoctrination and participation of children in religion” which may be done “in the name of their health and welfare” nor give warrant for “every limitation on their religious training and activities.” The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and

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far as pertinent, read:

Section 80. Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both.

Section 81. Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive . . . shall for a first offense be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both . . . .”

*Id.*

36. *Prince*, 321 U.S. at 166.

37. *Id.*

38. *Id.* at 167.

all others . . . remain unaffected by the decision.<sup>39</sup>

Although *Prince* appears to weaken a parent's case against schools offering sex education, many argue that it has little effect. First, the Court notes that the decision was limited to the facts specific to the case. The Court notes that forms of religious training and indoctrination, other than those denoted in the case, are unaffected by the decision. This decision leaves religious teachings against advocating premarital sex or birth control unaffected. Second, parents argue that a sex education curriculum that instructs a child in the use of birth control is actually contrary to "a youth's well-being," as the only way to completely protect a child against sexually transmitted diseases and pregnancy is to teach and encourage abstinence. Despite the fact that some forms of contraception may reduce the risk of disease or pregnancy, parents argue that encouraging children to use such items is essentially condoning a child's decision to have sexual intercourse—a view that is contrary to the teachings of many parents and religions.

#### 5. *Wisconsin v. Yoder*

A later case that gives an example of the Court's protection of religious training and indoctrination is *Wisconsin v. Yoder*.<sup>40</sup> In *Yoder*, Amish parents objected to a 1969 Wisconsin statute that made school attendance mandatory until the age of sixteen. Specifically, the parents argued that the statute violated their First Amendment right to freedom of religion. The Court upheld the challenge by the Amish parents noting that the State lacked a sufficiently compelling justification for imposing such a burden. In addition, the Court reaffirmed the importance of the parental liberty interest to direct the upbringing of their children. Specifically the Court noted:

Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established

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39. *Id.* at 171.

40. 406 U.S. 205 (1972).

beyond debate as an enduring American tradition.<sup>41</sup>

Through this bold language, the Court emphasized the importance of the fundamental interest of parents to direct the upbringing of their children. Despite the unique facts of *Yoder*, the principles it establishes suggest that a parent may be successful in challenging school curriculum that is at odds with the parent's religious beliefs.

Many argue that this decision is a breakthrough decision for parents because the Court reinforces a parent's right to direct the upbringing of their children, including their religious education. This decision helps support a parent's disapproval of a school that teaches the use of birth control as part of its sex education. As many religions do not condone the use of artificial methods of birth control, *Yoder* provides a strong basis for parents to argue for their Constitutional right to direct the upbringing of their children with respect to sex education.

### *B. The Rights of Students*

Beginning in the early 1940s, a second line of cases began examining the conflict between the individual rights of students and the authority of the State. This line of cases arose during a period of time when America was involved in conflict abroad—most notably, World War II, the Korean War, and the Vietnam War, and continued through the 1970s.<sup>42</sup> During this period, students' rights to freedom of speech and expression emerged to the forefront of the balancing of rights controversy.

#### *1. West Virginia State Board of Education v. Barnette*

Beginning in 1943 with *West Virginia State Board of Education v. Barnette*,<sup>43</sup> the Court began recognizing students' rights under the First Amendment.<sup>44</sup> Additionally, the Court recognized that the Fourteenth Amendment, as applied to the states, was also applicable to schools.

In *Barnette*, the Court reviewed, in light of the Fourteenth

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41. *Id.* at 232.

42. See DAVIS ET AL., *supra* note 15, at 246.

43. 319 U.S. 624 (1943).

44. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

Amendment, a challenge to the West Virginia Board of Education's requirement that all students participate in saluting and pledging allegiance to the American flag.<sup>45</sup> A group of Jehovah's Witnesses brought the complaint. According to the beliefs of Jehovah's Witnesses, it is considered prohibited to bow before graven images--among which, they consider, is the flag.<sup>46</sup>

The Court ultimately found that the Board's requirement of saluting the flag was a violation of the students' rights of free expression under the First Amendment. The Court noted that schools do not have the right to compel students to declare their political beliefs. Writing for the Court, Justice Jackson expanded upon what the State may require schools to teach:

[T]he State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.<sup>47</sup>

Additionally, the Court noted that the protection of citizens under the Fourteenth Amendment also applies to school boards. Through powerful language, the Court expressed the importance of freedom of the individual. The Court stated:

The Fourteenth Amendment, as now applied to the States,

45. The January 9, 1942, Board of Education resolution read, in part:

Therefore, be it RESOLVED, [t]hat the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States--the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'--now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

*Barnette*, 319 U.S. at 628 n.2.

46. See *Exodus* 20:4-5 (King James) ("Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.").

47. *Barnette*, 319 U.S. at 631 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).

protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>48</sup>

Through this language, the Court noted the importance of education as a method of preparing today's youth for citizenship, and stressed the importance of preserving the Constitutional freedoms furthering this goal.

The *Barnette* Court not only emphasized individual rights, but also limited the reach of schools. The Court called for the "scrupulous protection of Constitutional freedoms of the individual."<sup>49</sup> In the context of sex education, the Court's ruling helped to protect children from participating in curricula that potentially conflicted with the student's fundamental religious beliefs.

## 2. *Tinker v. Des Moines Independent Community School District*

*Barnette* was just the beginning of the Supreme Court's attempt to recognize the importance of students' rights. In *Tinker v. Des Moines Independent Community School District*,<sup>50</sup> the Court was faced with a school board prohibition against students wearing black armbands in opposition to the hostilities associated with the Vietnam War.<sup>51</sup> Consequently, three students were sent home and suspended from school because of their failure to abide by the policy.

The Court affirmed the students' right to wear the armbands.<sup>52</sup> The Court stated that students enjoy the freedoms of

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48. *Id.* at 637.

49. *Id.*

50. 393 U.S. 503 (1969).

51. "[A]ny student wearing an armband to school would be asked to remove it and if he refused he would be suspended until he returned without the armband." *Id.* at 504.

52. Many commentators argue that *Tinker* was not only about children's rights, but also about family rights. See John Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 785

speech and expression that are protected by the First Amendment. "It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>53</sup> The decision of the Court in *Tinker* greatly expanded the rights of students. The question remains how far those rights extend.

### 3. *Wisconsin v. Yoder Dissent*

About three years after *Tinker*, Justice Douglas raised the issue of children's rights to self-determination in a dissenting opinion in *Wisconsin v. Yoder*.<sup>54</sup> He stated that Amish children had the right to be heard in deciding their educational future because he felt that a mature minor has a constitutionally protected interest in self-determination.<sup>55</sup>

Despite Justice Douglas's emphasis on a student's right to self-determination, the constitutional standard continues to be the supremacy of parental rights in most cases.

### C. *The Rights of Schools*

By the onset of the 1980s, the United States was emerging from a period of rapid societal change. It was a period plagued with some of the highest teen pregnancy rates in American history. With this societal change came a slow progression away from recognizing the rights of parents and students. Decisions by the Court tended to focus more on the right of schools to use their judgment in promoting community interest and standards. Three cases decided in the 1980s effectively illustrate this shifting ideology. These cases include *Board of Education v. Pico*,<sup>56</sup> *Bethel School District No. 403 v. Fraser*,<sup>57</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>58</sup>

#### 1. *Board of Education v. Pico*

In *Board of Education v. Pico*, the Court faced a challenge

(1978) (asserting that *Tinker* was really about family rights).

53. *Tinker*, 393 U.S. at 506.

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

55. See DAVIS ET AL., *supra* note 15, at 152 for an in-depth discussion of the Douglas dissent.

56. 457 U.S. 853 (1982).

57. 478 U.S. 675 (1986).

58. 484 U.S. 260 (1988).

to the school board's decision to remove certain books from the library that the board considered vulgar and inappropriate for students.<sup>59</sup> Ultimately, Justice Brennan, delivering the plurality opinion, prohibited the actions of the school board, stating that "the Constitution protects the right to receive information and ideas."<sup>60</sup>

The Court recognized the library as the "principal locus" of a student's freedom "to inquire, to study and to evaluate, to gain new maturity and understanding."<sup>61</sup> In the same respect, however, the Court stressed the school's "duty to inculcate community values."<sup>62</sup> According to the Court, the library is distinguishable from the school curriculum as the library is not included in the "compulsory environment of the classroom."<sup>63</sup>

In one sense, *Pico* protects students' individual freedom. More importantly, however, the Court stresses the school's duty to inculcate fundamental values. In very crucial language the Court states:

We [the Court] are therefore in full agreement . . . that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."<sup>64</sup>

The *Pico* decision, despite being a victory for the rights of schools, nonetheless supports many parents' views that liberal sex education does not belong in schools. By noting that local school boards have a "legitimate and substantial" interest in "promoting . . . traditional values be they social, moral, or po-

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59. The books were banned from both the junior and senior high school because they were "anti-American, anti-Christian, anti-[Semitic], and just plain filthy." *Pico*, 457 U.S. at 857. Nine books were removed from the High School library; they include the following: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin' But A Sandwich*, by Alice Childress; and *Soul On Ice*, by Eldridge Cleaver. The book in the Junior High School library that was removed was *A Reader for Writers*, edited by Jerome Archer. "Another listed book, *The Fixer*, by Bernard Malamud, was found to be included in the curriculum of a 12th-grade literature course." *Pico*, 457 U.S. at 857.

60. *Pico*, 457 U.S. at 867 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

61. *Id.* at 868 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

62. *Id.* at 869.

63. *Id.*

64. *Id.* at 864.

litical," the Court leaves wide open the decision as to what should be taught in schools.<sup>65</sup> Many argue that teaching traditional social and moral values would support a curriculum that discourages premarital sex and the use of birth control as a method to help protect against sexually transmitted diseases. Many of today's programs actually concede the fact that teenagers "are going to have sex." Many argue that this is counterproductive to the welfare of today's children. Rather, schools should teach and encourage only traditional social and moral values—namely abstinence, as only abstinence is completely effective in preventing pregnancy and sexually transmitted diseases.

## 2. *Bethel School District No. 403 v. Fraser*

Roughly six years later, the Court faced another challenge dealing with the reach of a school's "inculcating" role. In 1986, in *Bethel School District No. 403 v. Fraser*,<sup>66</sup> a student delivered a lewd speech before a mandatory school assembly of approximately 600 high school students. As a result of the speech, the student was suspended.

The *Fraser* decision represents a departure from *Tinker*. According to the Court, although students do share in the First Amendment guarantees, such freedoms are not necessarily given the same latitude as adults.<sup>67</sup> The Court noted that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of schools."<sup>68</sup>

Throughout its decision, the Court stressed the importance of the school's role to inculcate and protect the fundamental values of the community. Again, although the Court protected the rights of schools, it stressed once again the importance of inculcating "fundamental values." It is argued by many that fundamental values do not include condoning premarital sex.

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65. *Id.*

66. 478 U.S. 675 (1986).

67. *See id.* at 682.

68. *Id.* at 683.

### 3. *Hazelwood School District v. Kuhlmeier*

In *Hazelwood School District v. Kuhlmeier*,<sup>69</sup> the Court again attempted to further define the role of schools. The *Hazelwood* Court upheld the school principal's decision to censor the school newspaper by choosing not to run two articles.<sup>70</sup> The Court again noted the role of schools to inculcate fundamental values: "We hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored . . . activities . . ." <sup>71</sup> Specifically, schools must retain their editorial capacity concerning speech that might "advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with . . ." other shared values of the community.<sup>72</sup>

The *Hazelwood* decision was a crucial step in defining the inculcation of values in schools. The Court emphasized that the school's role in limiting students' individual rights is restricted to actions that are "reasonably related to legitimate pedagogical concerns."<sup>73</sup> What constitutes a legitimate pedagogical concern is still open for interpretation.

Nonetheless, the Court specifically noted that a school shall maintain its authority to "refuse . . . speech that might reasonably be perceived to advocate . . . irresponsible sex . . ." <sup>74</sup> The Court has not yet determined whether school sex education programs that teach using birth control to protect oneself against disease and pregnancy is advocating irresponsible sex. However, many believe that such programs are, in fact, teaching irresponsible sex. Indeed many of these opponents feel that sex outside of marriage is, in truth, irresponsible.

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69. 484 U.S. 260 (1988).

70. One of the articles described three Hazelwood East students' experiences with pregnancy. The other article dealt with the impact of divorce on students in the school. As to the first article, Principal Reynolds was concerned that the identities of the individuals in the story were not effectively disguised. Further, he felt that the articles' reference to sexual activity and birth control was inappropriate for some students. As to the second article, Reynolds felt that the student's parents should have been given opportunity to respond to comments made about them in the article. *See id.* at 262-265.

71. *Hazelwood*, 484 U.S. at 273.

72. *Id.* at 272.

73. *Id.* at 273.

74. *Id.* at 272.

### III. THE EFFECTIVENESS OF SEX EDUCATION

Throughout the twentieth century, there has been a marked increase in the level of sex education in the classroom. Is this instruction effective? Many argue that it is not, citing numerous studies that illustrates a high incidence of teenage pregnancies and sexually transmitted diseases. Others argue that sex education in schools is proving to be effective, citing selected studies showing that the situation is improving.

There are also different philosophies with regard to offering sex education in the classroom. On one hand, there are individuals who simply accept the fact that teenagers are going to have sex. These individuals generally advocate instructing students on the use of contraceptives as a means of reducing the risk of pregnancy and sexually transmitted diseases. On the other hand, there are individuals who believe that premarital sex among teenagers is not condonable behavior. These advocates generally support either abstinence-based sex education programs or home-based sex education. Regardless of the philosophy one takes, the fact remains that sex among teenagers has serious, and often dangerous, consequences. Pregnancy rates and incidences of sexually transmitted diseases are high among teenagers.

#### *A. Trends and Statistics*

The largest obstacle that must be overcome regarding an analysis of trends and statistics is the lack of comparable data over the years. Studies of youth risk behaviors and sexuality were not readily available until the 1980s, so comparisons are difficult, if not impossible. Nonetheless, available data plays a crucial role in further understanding the state of teenage sexuality today.

##### *1. Sex Education Curriculum*

Throughout the course of the twentieth century, sex education has grown to become a more regular aspect of school curriculum. What was once taboo—namely, the discussion of sex—is becoming a more accepted part of a teenager's life. The subject matter of these sex education programs is also expanding. (See Table 1).

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**Table 1. Number of women 18-44 years of age and percent who had formal sex education before they were 18, by age: U.S., 1995.**

Age (at inter- view)	Type of Instruction Received				
	Any Formal Instruc- tion	Birth Control Methods	STDs	HIV Prevention	How to Say "No" to Sex
All Women	72.8%	62.0%	62.7%	52.0%	55.0%
18-19 years	95.9	86.9	93.2	91.3	89.9
20-24	89.2	80.9	82.1	64.1	80.1
25-29	80.4	71.7	71.1	27.0	62.0
30-34	73.0	62.3	60.8	11.6	49.3
35-39	65.0	53.7	55.5	N/A	41.5
40-44	51.4	36.2	37.0	N/A	35.2

Source: J.C. Abra et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth*, National Center for Health Statistics, *Vital Health Stat.* (23(19) (1997).

In recent decades, sex education programs have deviated from their original purposes of educating children on human development, reproduction, and diseases. Many of today's curricula include information on the correct way to use condoms and how to reduce the risk of becoming pregnant. The focus of sex education courses has shifted from a mentality that discouraged teenage premarital sex to one that accepts sexual intercourse as typical teenage behavior.

Unfortunately, because of this change in mentality, today's youth have suffered. Nearly seventy percent of all boys and girls have had sexual intercourse by the twelfth grade.<sup>75</sup> As a result, one in four new cases of HIV in the United States occurs in people under twenty-two.<sup>76</sup> Abortion rates and rates of sexually transmitted diseases are highest among individuals under

75. See Centers for Disease Control and Prevention, *CDC Surveillance Summaries: Youth Risk Behavior Surveillance--United States, 1995* (visited Nov. 11, 1999) <<http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/00043812.html>>.

76. See P.S. Rosenberg et al., *Declining Age at HIV Infection in the United States*, 330 *NEW ENG. J. MED.* 789, 789-90 (1994).

twenty-five.<sup>77</sup> Additionally, pregnancy rates among young people 15 to 19 years old continue to rise.<sup>78</sup>

## 2. Sexually Transmitted Diseases

Sexually transmitted diseases are among the most common infectious diseases in the United States today. Chlamydia<sup>79</sup> rates exceed that of all other notable infectious diseases in the United States.<sup>80</sup> Further, more than twenty sexually transmitted diseases have been identified.<sup>81</sup> The spread of these preventable diseases is becoming an epidemic among today's young people, annually affecting roughly ten million people under the age of twenty-five.<sup>82</sup> Because of sexual promiscuity, many teenagers are putting themselves at risk of acquiring HIV/AIDS infections and other sexually transmitted diseases.

According to the Centers for Disease Control and Prevention, incidences of sexually transmitted disease are rising, in part because in the last few decades young people have become sexually active earlier yet are marrying later.<sup>83</sup> As long as this trend continues, teenagers are going to face the negative consequences associated with premarital sex.

Although the number of reported cases of some forms of sexually transmitted diseases—like gonorrhea—has been declining in recent years, the spread of others types of sexually transmitted diseases—like HIV/AIDS—is increasing.<sup>84</sup> None-

77. See S.J. Ventura et al., *Trends in Pregnancies and Pregnancy Rates: United States, 1980-92*, 43 MONTHLY VITAL STAT. REP. 11, 3 (1995) (illustrating that abortion rates among individuals 18-19 and 20-24 year olds are higher than any other age group).

78. *Id.* at 4 (illustrating that pregnancy rates from 1976 to 1992 among those 15-19 years old have increased from 101.4 per 1,000 to 111.3 per 1,000).

79. An infectious sexually transmitted disease, *Chlamydia trachomatis*, may cause abnormal genital discharge and burning with urination. In women, these infections often result in pelvic inflammatory disease, which can cause infertility, ectopic pregnancy, and chronic pelvic pain. See *Recommendations for the Prevention and Management of Chlamydia trachomatis Infections, 1993* (visited Nov. 11, 1999) <<http://wonder.cdc.gov/wonder/prevguid/p0000222/entire.htm>>.

80. See Division of STD Prevention, *1996 Sexually Transmitted Disease Surveillance* (visited Nov. 11, 1999) <<http://wonder.cdc.gov/wonder/STD/title4000.html>>.

81. See Division of STD Prevention, *Tracking the Hidden Epidemics: Trends in the STD Epidemics in the United States* (visited Nov. 1999) <[www.cdc.gov/nchstp/std/stats\\_trends/std\\_trend.pdf](http://www.cdc.gov/nchstp/std/stats_trends/std_trend.pdf)>.

82. See *id.*

83. See Division of STD Prevention, *1996 Sexually Transmitted Disease Surveillance* (visited Nov. 11, 1999) <<http://wonder.cdc.gov/wonder/STD/title4000.html>>.

84. See *id.*

theless, even those diseases that are declining are still most prevalent among young people. Additionally, sexually transmitted diseases account for over five billion dollars in spending a year.<sup>85</sup>

Ultimately, sex education classes that consider sex as typical teenage behavior, and advocate the use of condoms as a means of practicing safe sex, are sending mixed messages to today's youth. Young people are at risk. By participating in sexual activity, whether "protected" or not, young people are subjecting themselves to the possibility of contracting a sexually transmitted disease like AIDS. With a failure rate of 13-28 percent among young people,<sup>86</sup> condoms do not effectively protect individuals from the many debilitating and deadly diseases.

### 3. Teenage Pregnancy

Like sexually transmitted diseases, teenage pregnancy is an epidemic among today's youth. (See Table 2). Despite efforts to reduce adolescent pregnancy, pregnancy rates among young people are on the rise.<sup>87</sup> Additionally, both the public health impact and the societal and individual costs of adolescent pregnancy are well known.<sup>88</sup> Not only are financial costs high, but there are significant physical and psychological burdens to the young mothers and their children.<sup>89</sup>

Teenage mothers are less likely to complete their education. Consequently, they will likely have limited career and economic opportunities. Additionally, teenage mothers are more likely to rely on welfare, have failed marriages, and future unintended pregnancies.<sup>90</sup>

Many praise sex education classes that advocate the use of birth control as the reason behind decreasing birth rates among teenagers. While it is true that birth rates have been

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85. *See id.*

86. *See* Douglas J. Besharov, *Risks and Realism: Teen Sex*, AM. SPECTATOR 52, 54-55 (March/April 1993).

87. *See* Ventura et al., *supra* note 77, at 11, 4.

88. *See generally* *Teen Sex and Pregnancy* (visited Nov. 10, 1999) <[http://www.agi-usa.org/pubs/fb\\_teen\\_sex.html](http://www.agi-usa.org/pubs/fb_teen_sex.html)>.

89. *See Teenage Pregnancy and Too-Early Childbearing: Public Costs, Personal Consequences*, CENTER FOR POPULATION OPTIONS (6<sup>th</sup> ed. 1992).

90. *See* B.S. Zuckerman et al., *Adolescent Pregnancy: Biobehavioral Determinants of Outcome*, 105(6) J. PEDIATRICS 857 (1984).

declining in recent years, approximately 40% of all pregnancies among adolescents end in abortion.<sup>91</sup> Birth rates do not account for this fact. Like sexually transmitted diseases, despite some trends of declining incidence, the overall picture is not good. The birth rates among teenagers are high and the negative effects of teenage pregnancies are severe.

**Table 2. Estimated pregnancy rates, birth rates, and abortion rates by age of woman: United States. (Rates per 1,000 in specified group)**

YEA R	AGE OF MOTHER					
	UNDER 15 YEARS			15 - 19 YEARS		
	Pregnancy Rate	Birth Rate	Abortion Rate	Pregnancy Rate	Birth Rate	Abortion Rate
1993	†	1.4	†	†	59.6	†
1992	3.2	1.4	1.5	111.3	60.7	35.5
1991	3.2	1.4	1.4	115.0	62.1	37.6
1990	3.3	1.4	1.5	115.0	59.9	40.3
1989	3.4	1.4	1.6	113.2	57.3	42.0
1988	3.4	1.3	1.7	109.4	53.0	43.5
1987	3.5	1.3	1.8	104.8	50.6	41.8
1986	3.6	1.3	2.0	104.7	50.2	42.3
1985	3.6	1.2	2.0	106.9	51.0	43.5
1984	3.5	1.2	2.0	105.8	50.6	42.9
1983	3.3	1.1	1.9	107.2	51.4	43.2
1982	3.1	1.1	1.6	107.8	52.4	42.7
1981	3.1	1.1	1.7	109.2	52.2	42.9
1980	3.2	1.1	1.7	110.0	53.0	42.7
1979	†	1.2	†	†	52.3	†
1978	†	1.2	†	†	51.5	†
1977	†	1.2	†	†	52.8	†
1976	3.2	1.2	1.6	101.4	52.8	34.3

†: Not Available

Source: CDC and NCHS.

91. See Alison M. Spitz et al., *Pregnancy, Abortion, and Birth Rates Among US Adolescents—1980, 1985, and 1990*, 275 JAMA 13 (1996).

### *B. Comparing Philosophies and Goals*

In order to combat the alarming rate of sexually transmitted diseases and teenage pregnancies, many school boards have adopted or revised their sex education curriculum. Just as philosophies vary among parents, schools across the country have adopted different ways of handling their sex education programs.

Many schools have adopted sex education programs that include the distribution of condoms to students who request them. Other schools have chosen a different route by adopting abstinence-based sex education.

#### *1. Condom Distribution in Schools*

Many schools across America have attempted to combat high rates of teenage pregnancy and sexually transmitted diseases, including the HIV virus, by distributing condoms to students requesting them. Although condom use can be successful in lowering the risks of becoming pregnant or contracting a sexually transmitted disease, it is not by any means, completely effective.<sup>92</sup>

There are many reasons that schools have elected to create condom distribution programs. Reasons range from reducing the financial and psychological barriers associated with acquiring condoms, to eliminating the stigma associated with obtaining and using condoms.<sup>93</sup> Despite their goals, these programs have experienced only limited levels of acceptance throughout the country. Two cases effectively illustrate the reactions to condom distribution in schools.

##### *a. Alfonso v. Fernandez*

In *Alfonso v. Fernandez*,<sup>94</sup> the New York City Board of Education voted to expand their HIV/AIDS curriculum by introducing classroom discussion on various aspects of HIV/AIDS and by making condoms available upon request at the school.<sup>95</sup>

92. See Besharov, *supra* note 86, at 52, 54-55.

93. See DOUGLAS KIRBY, SEXUALITY AND HIV EDUCATION PROGRAMS IN SCHOOLS, IN SEX EDUCATION IN THE SCHOOLS 9 (Jayne Garrison et al. eds., 1994) (Sexuality and American Social Policy Series No. 3).

94. 606 N.Y.S.2d 259 (App. Div. 1993).

95. In order to receive a condom, a student must participate in personal health guidance counseling which involves the proper use of condoms and the consequences of

A parental opt-out provision was available "whereby a parent may opt his or her minor unemancipated child out of the classroom instruction upon the assurance that the child . . . receive such instruction at home."<sup>96</sup> No such provision existed, however, with respect to the condom distribution program.<sup>97</sup>

Parents of students in the New York City public schools sued to enjoin the implementation of the condom availability facet of the expanded HIV/AIDS curriculum. The court stated that it:

(a) violate[d] Public Health Law §2504, because [the program] constitute[d] "health services" to unemancipated, minor children without the consent of their parents or guardians, and therefore is not authorized by law, (b) violate[d] their due process rights to direct the upbringing of their children, and (c) violate[d] their rights to the free exercise of their religion as guaranteed by the First Amendment . . . .<sup>98</sup>

Upholding the first two of the parents' claims, the majority ruled that the condom distribution program did, in fact, constitute a health service and thus, parental consent was required.<sup>99</sup> Further, the majority noted that the program "impermissibly trespasses on the petitioners' parental rights."<sup>100</sup> Additionally, the majority stated:

Because the Constitution gives parents the right to regulate their children's sexual behavior as best they can, not only must a compelling state interest be found supporting the need for the policy at issue, but that policy must be essential to serving that interest as well.<sup>101</sup>

Ultimately, the majority concluded that the condom distribution program was not sufficiently tailored to the State's interests in controlling the spread of HIV/AIDS. Therefore, the

their use and misuse. *See id.* at 261.

96. *Alfonso*, 606 N.Y.S.2d at 261.

97. *See id.* ("Although the Board considered the possibility of allowing parents who disapprove of the distribution of condoms to opt-out of the voluntary program, the Board concluded that an opt-out provision would be unwise because students whose parents disapprove of premarital sexual relations may especially be in need of a place where they can obtain condoms without having to account for any expenditures of funds or having to identify themselves before they could be given a condom . . ."). *Id.* at 269 (Eiber, J., dissenting).

98. *Id.* at 261.

99. *See id.* at 263.

100. *Id.* at 265.

101. *Alfonso*, 606 N.Y.S.2d at 265.

State could not encroach upon the parental right to direct the upbringing of one's children.<sup>102</sup>

Despite the defeat of the parent's freedom of religion claim, the decision in *Alfonso* sent a clear message that parents should have the freedom to control and "regulate" their child's sexual behavior. Many parents believe that this encompasses the right to limit and/or regulate the level and nature of sex education their child receives.

*b. Curtis v. School Committee of Falmouth*

Despite *Alfonso's* clear message, the decision was not the last word with respect to condom distribution in schools. Roughly one and a half years later, *Curtis v. School Committee of Falmouth*<sup>103</sup> came to the forefront of the condom distribution controversy. In *Curtis*, parents and students in the Falmouth public school system brought an action against the school system in response to the implementation of a condom availability program established by the school committee.<sup>104</sup>

Because the program did not include a parental opt-out provision, the parents argued that the condom availability program violated their Fourteenth Amendment rights to direct the upbringing of their children and that the parents' and students' rights to freedom of religion under the First Amendment. The Supreme Judicial Court of Massachusetts denied both of the Constitutional claims.

With respect to the Fourteenth Amendment claim, the court acknowledged the parents' right to direct the upbringing of their children. However, the court felt that the condom availability program did not burden the parents' rights "to an extent which would constitute an unconstitutional interference by the State."<sup>105</sup> The interference, according to the court, must be one that causes a "coercive or compulsory effect on the claimants' rights."<sup>106</sup> Because the condom availability program was

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102. *See id.* at 267.

103. 652 N.E.2d 580 (Mass. 1995).

104. The condom availability program implemented by the Falmouth school committee allowed students to request free condoms from the school nurse or purchase them for \$.75 cents in the restrooms. Counseling from the school nurse, trained staff, and printed materials was available upon request. *See id.* at 582-83.

105. *Id.* at 585.

106. *Id.* (The court did note, however, that the "coercion" standard had never been explicitly identified by the Supreme Court as the standard to apply.)

purely voluntary on the part of students, the court felt that the parents' rights were not violated. Conclusively, because the program lacked a coercive effect, according to the court, neither an opt-out provision nor parental notification was required. Additionally, the court dismissed the freedom of religion claim, stating that the program did not violate one's right to freely exercise their religion.

The decision in *Curtis* departs significantly from the ruling in *Alfonso*. Many parents and commentators have criticized *Curtis*, stating that without either an opt-out provision or parental notification, parents are impeded from freely exercising their right to direct the upbringing of their children.<sup>107</sup>

Additionally, despite these efforts by schools to prevent the spread of diseases, the author sees no definitive proof that condom availability programs are effective. Furthermore, these programs have been met with resistance from community and religious groups.<sup>108</sup>

## 2. Abstinence-based Sex Education

Many schools have chosen to implement abstinence-based sex education in order to help prevent the ills associated with premarital sex. Behind abstinence-based sex education is the philosophy that in order to truly improve the problem of sexually transmitted diseases and teenage pregnancy, one needs to focus one's efforts on the cause of the problem: teenagers having sex outside of marriage.

Given the efficacy of abstinence, many states have passed laws requiring that sex education in schools be abstinence based.<sup>109</sup> Under these abstinence-based programs, results have been very positive.

One example of an abstinence-based sex education program that is achieving success is the "Project Taking Charge" program introduced in Nathan Hale Middle School, a junior high in the Crestwood suburb of Chicago, Illinois. Many were skeptical when the school decided to adopt the abstinence-based

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107. See Family Research Council, *Parental Rights: Who Decides How Children are Raised?* (visited Nov. 1999) <<http://www.frc.org/fampol/fp96hpa/html>>.

108. See *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (App. Div. 1993).

109. Some of these states include the following: California, Illinois, Indiana, Pennsylvania, Texas, and Washington. See Onalee McGraw and Margaret Whitehead, *Foundations for Family Life Education*, EDUCATIONAL GUIDANCE INSTITUTE, 1991, at 10.

program. However, after three years in the program, the school has graduated three pregnancy-free classes in a row.<sup>110</sup>

Another example of an abstinence-based program is the "Sexuality, Commitment, and Family" curriculum developed by Teen-Aid, Inc. The program, which was introduced in San Marcos Junior High School in San Marcos, California, has produced positive results. The year preceding the introduction of the abstinence-based program, 147 girls had become pregnant. After two years since the program was adopted, 20 girls have become pregnant.<sup>111</sup>

In addition to school-based programs which promote abstinence, other initiatives both in and out of school, like "Choosing the Best," "Teen Choice," "Best Friends," and "Sex Respect" are promoting a premarital sexual abstinence lifestyle. These programs are also receiving a measurable amount of success.<sup>112</sup>

Abstinence-based sex education programs are becoming more popular across the country. According to the Centers for Disease Control and Prevention in Atlanta, Georgia, sexual abstinence is "the most effective solution" to preventing unwanted pregnancies and sexually transmitted diseases.<sup>113</sup> As a result, many have identified abstinence-based education as the only positive alternative to protecting today's youth.

#### IV. PROPOSED MODEL SEX EDUCATION CURRICULUM

In proposing a model sex education curriculum for schools across the United States, many factors must be taken into consideration, including the rights of parents, students, and schools. Ultimately, however, it is imperative to identify what is best for the future of America and what is in the best interest of children.

Statistics are clear: postponing sexual activity until after marriage can eliminate the risk of sexually transmitted diseases. Furthermore, the rate of unwanted pregnancies after

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110. See Family Research Council, *Sex Education: What Works?* (visited Nov. 6, 1995) <<http://www.frc.org/frc/infocus/if95k2ab.html>>.

111. See Dinah Richard, *Has Sex Education Failed Our Teenagers?: A Research Report*, EDUCATIONAL GUIDANCE INSTITUTE, 1990, at 59-60.

112. See Family Research Council, *Sex Education: What Works?* (visited Nov. 6, 1995) <<http://frc.org/frc/infocus/if95k2ab.html>>. See also *Sex Education: What Works?* (visited Nov. 1999) <<http://townhall.com/townhall/spotlights/9-11-95/if93jab.html>>.

113. *Condoms and Their Use in Preventing HIV Infection and Other STDs*, CENTERS FOR DISEASE CONTROL AND PREVENTION, July 30, 1993, at 3.

marriage is almost nonexistent. Additionally, emotional issues associated with having sex too early in life can be eliminated through programs that encourage and advocate postponing sexual activity until after marriage.

### *A. Underlying Principles of ExCEL*

In order to address the social ills associated with premarital sex, I propose a four-part sex education program—represented by the acronym ExCEL. In developing this program, I made certain that the message being sent to children was clear. So often in today's sex education classes, children are sent mixed messages. On one hand, students may hear that abstinence is the best policy, while on the other hand they are informed of how to use contraception should they choose to have sex. These mixed-message programs are confusing. ExCEL's message, however, is unequivocal and well defined—that is, abstinence is the only policy.

ExCEL is a program that was developed for implementation by school boards and school administrations. The program does not rely on schools as the only educator of children. Rather, ExCEL encourages parental involvement in the upbringing of their child. Communication between parent and child is crucial for a healthy upbringing. ExCEL does not pretend that schools can be substitutes for parental involvement in a child's upbringing. Rather, the program merely fosters necessary interaction between parent and child.

ExCEL takes sex education one step further. Underlying the ExCEL program is a belief that future generations are important. They will be the leaders of tomorrow; they will be the parents of tomorrow. The values they will teach their children start with their actions today.

Youth often resort to sex as a method of creating intimacy. Many kids feel that having sex will make them feel loved. By promoting the fact that every child is special and every child needs to be loved and cared for, ExCEL tackles one of the underlying causes of teenagers having sex: a need to be loved.

### *B. The Four-Prong Program*

The ExCEL program is a four-part program designed to get parents, students, and schools involved in educating children about sex. Participation of all three parties is important for the program to work. Schools, alone, cannot effectively teach sex

education without the involvement of parents. The four parts of the program are as follows:

- Expect more . . . expect abstinence
- Contain school involvement
- Encourage parental involvement
- Let students know they are loved.

*1. Expect More . . . Expect Abstinence*

It is time that we expect more out of our children. To do so, however, we must be clear as to what we expect. That is, teaching abstinence as the best policy in one breath and then teaching children how to “protect” themselves during sexual intercourse in another sends mixed messages about sexual intimacy. We must remain firm that abstinence from sex before marriage is the best and only policy that effectively protects individuals against pregnancy, sexually transmitted diseases, and the emotional ramifications associated with these social ills. Medical experts and sociological studies support this notion.<sup>114</sup>

Furthermore, we must prepare our children for success rather than give them the tools for failure. When our teachings include information about how to “protect” oneself during sexual intercourse, we are merely accepting their failure. Additionally, we are contributing to this failure.

When we set low standards for our kids, they tend not to try as hard as they would if more was expected out of them. That is, when we expect the most from our kids and challenge them to reach these high expectations, they are more likely to achieve a higher overall level of success. It is true that not all students may reach this pinnacle, but it does a disservice to students for us to expect less than the best. Teachers expect the most when it comes to Math and English and society expects children not to smoke, drink, or do drugs. So why do we compromise when it comes to sex?

The fact is that we should not compromise on the well being and the future of our children, whether academic or social in nature. By holding a high, but reasonable standard for children to reach when it comes to sexual intercourse, namely absti-

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114. See Alice Fryling, *Why Wait for Sex?* (visited Nov. 12, 1999) <[http://www.gospelcom.net/iv/slj/sp95/sp95\\_why\\_wait\\_for\\_sex.html](http://www.gospelcom.net/iv/slj/sp95/sp95_why_wait_for_sex.html)>.

nence before marriage, they are likely to try harder to reach this goal. However, if we set them up for failure from the start, they are more likely to do just that—fail.

## *2. Contain School Involvement*

Schools are prime forums in which to educate children and prepare them for the future. However, the extent to which public schools involve themselves in social issues should not impinge upon the teachings of parents and churches.

With respect to sex education, schools play an active and important role in educating children. Information involving social hygiene, anatomy, sexually transmitted diseases, pregnancy, and abstinence has a proper place in a school's sex education program. This type of information helps to foster healthy communication about crucial issues. However, when schools trump parents' rights to direct the upbringing of their children—most notably by advocating and distributing condoms—many argue that schools have overstepped their bounds.

It is true that the State has a compelling interest in lowering the rate of out-of-wedlock teenage births, abortions, and sexually transmitted diseases. While providing knowledge about birth control may help reduce these problems, they are not completely effective. Furthermore, advocating the use of birth control tends to encourage premarital sex. Premarital sex will jeopardize the emotional and physical well being of the student.

Schools should not advocate premarital sex, which can unreasonably harm the student. The best way to meet the interest of the State is to advocate abstinence from sex before marriage. No other alternative more directly addresses the State's compelling interest.

## *3. Encourage Parental Involvement*

Additionally, in order to address the State's compelling interest, it is crucial for schools to involve parents in the sex education of their child. After-school or evening programs that instruct both parents and students would help serve many functions.

First, such a program would help bridge the ever-prevalent gap of communication between parents and children with regard to sex education. Second, it would help to educate parents on some of the important issues facing children when it comes

to sex. Third, these programs ultimately allow parents to have the final say as to what is appropriate for their child.

Many may argue that such a program would not be feasible, as parents are very busy with their own work schedule. I answer this in two ways. First, this program can be offered on numerous occasions so as to accommodate the often-busy schedules of parents. Second, I simply say, "It is all part of responsibilities associated with parenting." Society is suffering from the social ills associated with sex outside of marriage. Most often cited is the AIDS epidemic. Parents need to be informed and need to be involved in this aspect of raising children. By offering evening sex education seminars that foster communication, both schools and parents are helping to do what is best for children.

#### *4. Let Students Know They are Loved*

Many cite a need for love and intimacy as the reason so many young adults—especially young girls—have sexual intercourse. Sex does not create intimacy, rather it is an "expression of intimacy."<sup>115</sup> Students need to be aware of this.

Additionally, schools and parents need to be in tune with the many changes and pressures facing teenagers today. Ultimately, letting teenagers know that they are cared for and loved is an invaluable step in helping to reduce the number of teenagers having sex before marriage. When students have a sense of belonging, they are less likely to search for validation elsewhere, e.g. through sexual intercourse with someone who "cares" about them.

It is true that nothing can guarantee that a young adult will not have sex, just as nothing can guarantee that a young adult will use a condom during sexual intercourse. We, as a society, must encourage postponing sex until marriage. In the same respect, we must expect the most out of tomorrow's generation . . . we must do what is necessary for our youth to EXCEL. Anything less is an injustice.

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115. Alice Fryling, *Why Wait for Sex?* (visited Nov. 11, 1999) <[http://www1.gospelcom.net/iv/slj/sp95/sp95\\_why\\_wait\\_for\\_sex.html](http://www1.gospelcom.net/iv/slj/sp95/sp95_why_wait_for_sex.html)>.