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ABSTINENCE-ONLY EDUCATION FAILS AFRICAN AMERICAN YOUTH

INTRODUCTION

Studies consistently reveal that approximately half of all adolescents engage in sexual intercourse before graduating high school,¹ and many legal scholars have analyzed the correlation between youths' sexual activity and abstinence-only sex education.² Studies also consistently reveal that the percentage of Black American³ adolescents engaging in sexual intercourse substantially exceeds that of their White American⁴ counterparts,⁵ but few legal scholars have analyzed the relationship

1. See, e.g., NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, , TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE, AND CHILDBEARING, 2002, at 5 (2004), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_024.pdf [hereinafter TEENAGERS]; Jacqueline E. 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, 247 (2001); see also *infra* note 5.

2. See *infra* notes 6–8.

3. Consistent with scholarship, this Note will capitalize Black, recognizing Blacks as a distinct cultural group. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). This Note will also use the term Black, Black American, and African American interchangeably to describe Americans of African descent. Although some Black Americans do not identify themselves as African American, a 2005 survey found that the Black American population was nearly equally divided on whether they preferred the term African American or Black. Lee Sigelman et al., *What's in a Name? Preference for "Black" Versus "African-American" Among Americans of African Descent*, 69 PUB. OPINION Q. 429, 433–34 (2005). For a brief history of the development of terminology referring to Black Americans, see *id.* at 429–30.

4. Although many scholars do not capitalize the term White, relying on the argument that Whites do not constitute a specific cultural group, this Note will capitalize White because, at least in the context of this Note's topic, Whites constitute a specific cultural group as they are often directly compared with Blacks. Compare Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1771 n.15 (2001) ("We do not capitalize 'white' because whites do not comprise a specific cultural group."), and Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991) ("I do not capitalize 'white,' which is not a proper noun, since whites do not constitute a specific cultural group."), with Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 269 n.5 (1994) ("[T]his Article will . . . capitalize 'White,' on the grounds that, in this context, the White majority—and particularly White business and industrial interests—proceeds on a set of cultural assumptions with which the environmental justice advocate must deal."), and Brant T. Lee, *Critical Race Theory: History, Evolution, and New Frontiers: The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1260 n.1 (2004) ("I capitalize 'White' and 'Whiteness' throughout, on the premise that these terms are not natural, objective descriptions of a biological characteristic but instead represent a socially and culturally constructed identity category, much like religious or national affiliations, and therefore should be capitalized."). Additionally, the terms White and Caucasian will be used interchangeably in this Note.

5. Charles Barone et al., *High-Risk Sexual Behavior Among Young Urban Students*, 28 FAM.

between Black youths' sexual activity and abstinence-only sex education.⁶ Legal scholars have addressed the dangers that abstinence-only programs cause for gay and lesbian youth,⁷ and for girls,⁸ but have all but failed to address the social ramifications such programs have on racial minorities.⁹ Several scholars argue that the right to information¹⁰ or freedom of religion guaranteed by the First Amendment¹¹ precludes federal endorsement of abstinence-only sex education. Others base legal justification for comprehensive sex education, as opposed to abstinence-only education, in international human rights law.¹²

PLAN. PERSP. 69 (1996); Patricia L. East, *Racial and Ethnic Differences in Girls' Sexual, Marital, and Birth Expectations*, 60 J. MARRIAGE & FAM. 150 (1998); Carolyn Tucker Halpern et al., *Implications of Racial and Gender Differences in Patterns of Adolescent Risk Behavior for HIV and Other Sexually Transmitted Diseases*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 239 (2004); Sara B. Kinsman et al., *Early Sexual Initiation: The Role of Peer Norms*, 102 PEDIATRICS 1185, 1190 (1998); Lydia O'Donnell et al., *Early Sexual Initiation and Subsequent Sex-Related Risks Among Urban Minority Youth: The Reach for Health Study*, 33 FAM. PLAN. PERSP. 268 (2001); Dawn M. Upchurch et al., *Gender and Ethnic Differences in the Timing of First Sexual Intercourse*, 30 FAM. PLAN. PERSP. 121 (1998). See also O'Donnell et al., *supra* (detailing negative health consequences of initiating sex at an early age).

6. Risha K. Foulkes provides excellent analysis of the effects of abstinence-only education on teens of color, but her piece, written in 2008, is the first to provide detailed analysis. Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2008). See also Michelle Fine & Sara I. McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 EMORY L.J. 993, 1004 (2007) ("Students who are in the most educational and health need—poor urban and rural students—are also the most likely to be miseducated through [abstinence-only] curricula.").

7. See, e.g., Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 COLUM. J. GENDER & L. 12 (2006); Danielle LeClair, Comment, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overturned*, 21 WIS. WOMEN'S L.J. 291 (2006); James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665 (2004).

8. See Fine & McClelland, *supra* note 6; LeClair, *supra* note 7; Terry Nicole Steinberg, *Feminist Sex Education: To Reduce the Spread of AIDS*, 17 WOMEN'S RTS. L. REP. 63 (1995).

9. See *supra* note 6.

10. See, e.g., Beh & Diamond, *supra* note 7; Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999).

11. See, e.g., Foulkes, *supra* note 6, at 41–49; Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603 (1987); 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. & WOMEN'S STUD. 265 (2000).

12. See 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); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653 (2007). The United States' international strategy towards fighting AIDS has also been criticized. See Erica Tracy Kagan, Note, *Morality v. Reality: The Struggle to Effectively Fight HIV/AIDS and Respect Human Rights*, 32 BROOK. J. INT'L L. 1201, 1217 (2007) ("The U.S. Leadership Act's emphasis on abstinence education represents the misguided notion of the United States, and especially the current administration, about how best to prevent the spread of sexually

The dearth of legal analysis of the impact of abstinence-only education on African American youth is surprising considering the groups' rates of sexual activity, teen pregnancy, and sexually transmitted diseases (STDs),¹³ including HIV/AIDS. Part I of this Note discusses the rates of STDs and pregnancy among Black youth. Part II discusses the historical and current frameworks of federal funding for abstinence-only education. Part II also addresses the increasingly strict prohibitions on the type of information teachers can disseminate in federally funded programs. Part III compares abstinence-only education programs with comprehensive sex education programs and shows that, although funding has increased for such programs, beneficial results from the implemented abstinence-only programs have not increased with increased funding.

Finally, in Part IV, this Note proposes a right to comprehensive sex education,¹⁴ based upon the Supreme Court's reasoning in *Plyler v. Doe*.¹⁵ Comprehensive sex education would alleviate the consequences youth, especially African American youth,¹⁶ suffer as a result of inadequate

transmitted disease."); see also HEATHER D. BOOMSTRA, GUTTMACHER INST., LEARNING FROM ADOLESCENTS TO PREVENT HIV AND UNINTENDED PREGNANCY, YOUNG PEOPLE AND PREGNANCY AND HIV PREVENTION (2007), available at http://www.guttmacher.org/pubs/2007/09/19/IB_PNG_2007.pdf.

13. The term sexually transmitted infection ("STI") has recently replaced sexually transmitted disease in the medical community because of its more inclusive definition. Planned Parenthood, Sexually Transmitted Diseases (STDs) & Safer Sex, <http://www.plannedparenthood.org/health-topics/stds-hiv-safer-sex-101.htm> (last visited Mar. 23, 2009). Sexually transmitted diseases (STDs) are caused by sexually transmitted infections (STIs) that have progressed. Although all STDs are preceded by STIs, not all STIs result in the development of STDs. *Id.* Often, the statistics in this Note concern an infection that has progressed into an STD, including chlamydia, gonorrhea, and syphilis. Thus, when the Note refers to statistics and rates, the term STD is applicable. In contrast, a general reference will use the term STI. When referring to studies and research, the Note will use the term used by the researchers in order to ensure accurate representation of the research.

14. Comprehensive sex education generally refers to a sex education program that both promotes abstinence and instructs about the use of contraceptives. The fundamental premise of the comprehensive program is that, while sexual abstinence is of course preferable, adolescents must also be taught "safe sex" practices in case they choose not to abstain. Moreover, in addition to teaching contraceptive use alongside abstinence, most successful comprehensive programs address the effects of peer influence, see Kinsman et al., *supra* note 5, account for personal attitudes and the "subjective norms" of "socio-cultural peer group[s]," see Howard C. Stevenson et al., *HIV Prevention Beliefs Among Urban African-American Youth*, 16 J. ADOLESCENT HEALTH 316, 321 (1995), and teach students skills needed to deal with sexual pressures, including communication skills, see Cynthia M. Lyles et al., *Best-Evidence Interventions: Findings from a Systematic Review of HIV Behavioral Interventions for US Populations at High Risk, 2000-2004*, 97 AM. J. PUB. HEALTH 133, 135 (2007). See also Steinberg, *supra* note 8, at 66-67.

15. 457 U.S. 202 (1982).

16. The focus on African Americans is not intended to ignore the problem of other societal groups, particularly racial, ethnic, and socioeconomic minorities, who are likewise not receiving comprehensive sex education; however, the plight of Black youth best illustrates the need for comprehensive sex education. Blacks disproportionately live in poverty, have the highest rate of

information on sex, a problem currently compounded by abstinence-only education.

I. AFRICAN AMERICANS, SEX, & CONSEQUENCES

Black Americans and White Americans perceive and experience the consequences of sex differently. Black culture generally attaches less stigma to early sexual debut and teen pregnancy than White culture.¹⁷ Blacks, though, suffer harsh consequences for their earlier sexual initiation, as they are disproportionately affected by STDs, including HIV/AIDS,¹⁸ and have higher rates of adolescent pregnancy than Whites.¹⁹ Part I.A discusses the relative ages that Blacks and Whites initiate sexual intercourse and posits possible explanations for the difference between the two cultural groups. Part I.B analyzes rates of sexually transmitted diseases, including HIV/AIDS, among Black and White youth, while Part I.C evaluates the prevalence of pregnancy among Black and White teens.

A. *Sexual Activity and Values Among Black Adolescents*

Black adolescents' higher rates of sexual activity coupled with evidence of their fundamentally different attitudes towards sex relative to White adolescents suggest that abstinence-only sex education is bound to be ineffective among Black youth. Studies consistently find that Black adolescents initiate sexual activity significantly earlier in life than White adolescents.²⁰ The Centers for Disease Control and Prevention (CDC) found that, while over six percent of all students engaged in sexual intercourse before the age of thirteen, nearly twenty-seven percent of Black males had done so by that age.²¹ The CDC also found that Black

HIV/AIDS, STIs, and teen pregnancy, and are the least likely to receive information about birth control. *See infra* Part I (discussing the rates of incident of these issues among Blacks as compared to other groups).

17. For a discussion of cultural views towards sex, see CATHY J. COHEN ET AL., BLACK YOUTH PROJECT, THE ATTITUDES AND BEHAVIORS OF YOUNG BLACK AMERICANS: RESEARCH SUMMARY 2, 11–13 (2007), available at http://www.blackyouthproject.com/writings/research_summary.pdf. *See also infra* Part I.A.

18. *See infra* Part I.B.

19. *See infra* Part I.C.

20. *See supra* note 5.

21. CTRS. FOR DISEASE CONTROL & PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2005, 55 MORBIDITY AND MORTALITY WKLY. REP.: SURVEILLANCE SUMMARIES 1, 19–20 (2006) [hereinafter RISK BEHAVIOR], available at <http://www.cdc.gov/mmwr/pdf/ss/ss5505.pdf>. For Black females the percentage was just over seven, compared to less than three percent of White females. *Id.*

students in grades nine through twelve were more likely to have had sex with four or more partners and to be currently sexually active than White students in the same grades.²² Findings suggest that African Americans' attitudes toward sex partially contribute to their increased sexual activity.²³ A number of studies and statistics demonstrate that Blacks exhibit a more accepting attitude towards engaging in sex at a young age and outside of marriage.²⁴ As a group, Blacks, as compared to Whites, were more accepting of pregnancy,²⁵ which, at the very least, demonstrates being more accommodating to the consequences of sex but also arguably implicates a more accepting attitude towards sex as well. Studies also find that African American youth are less likely to have sex after substance abuse than Caucasian youth,²⁶ implicating a more accepting attitude towards sex because Black students, more frequently than White students, engaged in sexual intercourse free of inhibition-lowering substances. White adolescents "were more likely to report that having sex" was "against their religion or morals" than Black adolescents,²⁷ suggesting that sexually active African American youth do not have the same psychological restrictions as their Caucasian peers, which allows Black youth a more open perspective on sex. Consistent with the idea that Black culture views sexual intercourse as not inconsistent with religion or morals, Black youth are also more likely to report having had four or more partners²⁸ and being currently sexually active.²⁹ And, at least for black male youth, sex is often perceived positively. One study found that Black boys in grades seven through twelve perceived both greater benefits and less shame from having sex than White boys.³⁰ The combination of experiencing less shame and greater benefits displays Black male youth's

22. *Id.* at 20.

23. See COHEN ET AL., *supra* note 17.

24. TEENAGERS, *supra* note 1, at 13; RISK BEHAVIOR, *supra* note 21; Barone et al., *supra* note 5; Juanita J. Cuffee et al., *Racial and Gender Differences in Adolescent Sexual Attitudes and Longitudinal Associations with Coital Debut*, 41 J. ADOLESCENT HEALTH 19 (2007); Halpern et al., *supra* note 5.

25. Cuffee et al., *supra* note 24, at 19, 22. Although Black girls had more negative perceptions of sex than their white peers, they were the most accepting of pregnancy, followed by Black boys. *Id.* at 23. White boys and girls perceived similar amounts of "shame and guilt with pregnancy." *Id.*

26. RISK BEHAVIOR, *supra* note 21, at 21; Halpern et al., *supra* note 5, at 243–45.

27. TEENAGERS, *supra* note 1, at 13; *id.* at 38 tbl.29.

28. RISK BEHAVIOR, *supra* note 21, at 20; see also Barone et al., *supra* note 5, at 72.

29. RISK BEHAVIOR, *supra* note 21, at 20. See also TEENAGERS, *supra* note 1, at 7 (noting that Black teen males "were more likely to be sexually active than" White males, but White and Black females "were more likely to be sexually active" than Hispanic females).

30. Cuffee et al., *supra* note 24, at 22. White girls had more positive perceptions about sex than Black girls, but both races held similar views regarding the shame and guilt accompanying sex. *Id.*

acceptance of sex. Black youth's views of sexuality demonstrate that abstinence-only education is particularly ill-suited to provide adequate sex education for their demographic.

B. HIV/AIDS and Other STDs Among Black Adolescents

Abstinence-only education is also ill-suited to address the rates of sexually transmitted diseases among Black youth. Black Americans are disproportionately affected by HIV/AIDS and other STDs. Blacks, who comprise approximately thirteen percent of the United States' population, account for forty-nine percent of new HIV/AIDS cases³¹ and forty-two percent of all cases “[s]ince the beginning of the epidemic.”³² More alarming, young people under the age of twenty-five represent one-half of all new HIV infections in the United States.³³ Of those aged thirteen to twenty-four, fifty-five percent of cases occur among African Americans.³⁴ The figure increases to sixty-six percent when considering cases among thirteen to nineteen year olds, and to seventy-one percent for those infected with HIV before the age of thirteen.³⁵ Compounding the problem, Black students are less likely to receive school instruction on HIV/AIDS³⁶ and birth control³⁷ than White students. One study found that Black males

31. For an HIV/AIDS case to be included in the CDC's surveillance, it must be supported by “laboratory and clinical evidence specifically indicative of HIV infection and severe HIV disease (AIDS).” CTRS. FOR DISEASE CONTROL & PREVENTION, CDC GUIDELINES FOR NATIONAL HUMAN IMMUNODEFICIENCY VIRUS CASE SURVEILLANCE, INCLUDING MONITORING FOR HUMAN IMMUNODEFICIENCY VIRUS INFECTION AND ACQUIRED IMMUNODEFICIENCY SYNDROME, 48 MORBIDITY & MORTALITY WKLY. REP.: RECOMMENDATIONS AND REPORTS 1, 11 (1999), available at <http://www.cdc.gov/mmwr/pdf/rr/rr4813.pdf>. A “new case” simply refers to the first time HIV/AIDS is discovered within an individual.

32. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC HIV/AIDS FACT SHEET: HIV/AIDS AMONG AFRICAN AMERICANS 1, 2 (2007) [hereinafter HIV/AIDS AMONG AFRICAN AMERICANS], available at <http://www.cdc.gov/hiv/topics/aa/resources/factsheets/pdf/aa.pdf>. The epidemic began in 1981 and, from 1981 through 2003, the CDC estimated that between 1.3 and 1.4 million people in the United States were infected with HIV/AIDS. CTRS. FOR DISEASE CONTROL & PREVENTION, THE HIV EPIDEMIC: WHAT IS THE MAGNITUDE?, <http://www.cdc.gov/hiv/resources/reports/hiv3rddecade/chapter2.htm> (last visited Jan. 8, 2007).

33. CATHY J. COHEN ET AL., RECLAIMING OUR FUTURE: THE STATE OF AIDS AMONG BLACK YOUTH IN AMERICA 6 (2005), available at http://www.blackaids.org/image_uploads/article_136/reclaim%20final%202.pdf.

34. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC HIV/AIDS FACT SHEET: HIV/AIDS AMONG YOUTH 1 (2006), available at <http://www.cdc.gov/hiv/resources/factsheets/pdf/youth.pdf> [hereinafter HIV/AIDS AMONG YOUTH].

35. COHEN ET AL., *supra* note 33, at 6.

36. RISK BEHAVIOR, *supra* note 21, at 22.

37. TEENAGERS, *supra* note 1, at 12–13; Laura Duberstein et al., *Changes in Formal Sex Education: 1995–2002*, 38 PERSP. SEXUAL & REPROD. HEALTH 182, 185 (2006). Although studies note this phenomenon, they do not indicate a reason for the disparity in sex education between Blacks

were less likely than others to receive instruction on birth control.³⁸ Another study discovered that approximately one-third of Americans generally reported “no formal instruction on contraceptive methods before” turning eighteen, but that forty-five percent of Black males reported no instruction before age eighteen.³⁹ This information is particularly alarming considering that a smaller proportion of Blacks remain alive after nine years of contracting HIV compared with other races.⁴⁰ Thus, the group most severely affected by HIV/AIDS, both in acquisition of the disease and in resulting lifespan, is the least likely to receive adequate instruction on how to avoid contracting the disease. Moreover, Black youth significantly underestimate their vulnerability to contracting HIV and other STDs,⁴¹ suggesting that accurate information about the risk is crucial to remaining healthy. Though it is possible to argue that students in abstinence-only programs receive education on how to avoid contracting diseases when they receive instruction to refrain from sex, this message is both inadequate and ineffective because of Black youth’s more accepting attitude towards sex and because the higher rates of HIV among Black youth prove that the message of abstinence-only is either not getting through or being ignored.

Along with the increased risk for HIV/AIDS, Black Americans are infected with chlamydia, syphilis, and gonorrhea at shockingly higher rates than White Americans.⁴² Black youth, because of their earlier

and Whites. Presumably, poverty helps account for the difference. Duberstein’s study found that males living two hundred percent below the federal poverty line were less likely to receive instruction on birth control than their peers. *Id.* at 184. As Blacks disproportionately live in poverty, it is presumable that many of those living in extreme poverty are Black males. *See infra* note 40 (discussing the poverty rate among Black Americans). Likewise, the concentration of African Americans in poverty likely affects the quality of sex education to which they have access.

38. Duberstein et al., *supra* note 37, at 184.

39. TEENAGERS, *supra* note 1, at 12–13.

40. HIV/AIDS AMONG AFRICAN AMERICANS, *supra* note 32, at 2. African Americans are disproportionately impoverished; in 1999, just under twenty-five percent lived in poverty. ALEMAYEHU BISHAW & JOHN ICELAND, U.S. DEP’T OF COMMERCE, POVERTY: 1999, CENSUS 2000 BRIEF 5 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-19.pdf>. Poverty affects the healthcare Black Americans receive and largely accounts for the difference in lifespan between Blacks and others races. *See* T. Diaz et al., *Socioeconomic Differences Among People with AIDS: Results from a Multistate Surveillance Project*, 10 AM. J. PREVENTIVE MED. 217 (1994) (noting that socioeconomic status can directly or indirectly affect the risk for contracting HIV).

41. Bonita Stanton et al., *Sexual Practices and Intentions Among Preadolescent and Early Adolescent Low-Income Urban African-Americans*, 93 PEDIATRICS 966, 970 (1994). Less than ten percent of all Black youths surveyed perceived themselves to be vulnerable to acquiring HIV or other STDs. *Id.*

42. CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 2005, at 63–65 (2006) [hereinafter SURVEILLANCE 2005]; CTRS. FOR DISEASE

initiation into sexual intercourse, are at increased risk of acquiring sexually transmitted infections (STIs).⁴³ In 2005, forty-one percent of all chlamydia and syphilis cases, and sixty-eight percent of gonorrhea cases, occurred among Blacks, with the highest concentrations among fifteen to twenty-four-year-olds.⁴⁴ Fifteen- to nineteen-year-old Black females were fourteen times as likely as White females of similar age to have gonorrhea in both 2005⁴⁵ and 2006,⁴⁶ while Black males of the same age group were thirty-six times more likely than comparable White males in 2005⁴⁷ and thirty-nine times more likely in 2006.⁴⁸ Furthermore, since 2004, syphilis rates among fifteen- to nineteen-year-old Black males have increased dramatically.⁴⁹ The prevalence of STDs among Black youth indicates current prevention efforts are inadequate.

C. Pregnancy Among Black Adolescents

The United States has the highest rate of adolescent pregnancy in the Western world.⁵⁰ Despite recent progress and sharp decreases in the number of teen pregnancies,⁵¹ teens in the United States are the most likely both not to use any method and to use less effective methods of birth

CONTROL & PREVENTION, SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 2006, at 69–75 (2007) [hereinafter SURVEILLANCE 2006].

43. Christine E. Kaestle et al., *Young Age at First Sexual Intercourse and Sexually Transmitted Infections in Adolescents and Young Adults*, 161 AM. J. EPIDEMIOLOGY 774, 776–77 (2005), available at <http://aje.oxfordjournals.org/cgi/reprint/161/8/774>. See *supra* Part I.A (discussing earlier initiation into sexual intercourse among Black youth).

44. SURVEILLANCE 2005, *supra* note 42, at 63–64.

45. *Id.* at 64.

46. SURVEILLANCE 2006, *supra* note 42, at 70.

47. SURVEILLANCE 2005, *supra* note 42, at 63–64.

48. SURVEILLANCE 2006, *supra* note 42, at 70.

49. *Id.* at 75 fig.U.

50. CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS TO TEENAGERS IN THE UNITED STATES, 1940–2000, 49 NAT'L VITAL STAT. REP. 1, 7 (2001), available at http://www.cdc.gov/NCHS/data/nvsr/nvsr49/nvsr49_10.pdf (“Rates for recent years have ranged from 4.3 births per 1,000 women aged 15–19 years in Japan (1997) to 48.7 in the U.S (2000). According to the latest available data, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, and Switzerland also had rates less than 10 per 1,000. A recent study showed that most developed countries have experienced declines in teenage birth rates.” (citations omitted)); Darroch et al., *supra* note 1, at 246 (finding that the United States had the highest rate of pregnancy among women under twenty of Great Britain, Canada, Sweden, France). At least one study has concluded other countries’ approaches to sex education help account for the disparity between pregnancy rates in the United States and other Western nations. See Heather Boonstra, *Teen Pregnancy: Trends and Lessons Learned*, GUTTMACHER REP. ON PUB. POL’Y, Feb. 2002, at 7, 9 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/1/gr050107.pdf>.

51. See GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS: NATIONAL AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY 2 (2006), available at <http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf>.

control than their peers in other developed countries.⁵² Scholars contend that this accounts for the large disparity among teen pregnancy rates in the United States and other developed countries.⁵³ Among those under the age of twenty in the United States, Blacks consistently have disproportionately higher rates of teenage pregnancy when compared to their White peers, despite a drastic overall decline since 1991.⁵⁴ Although rates were still decreasing among Black teens as of 2004, research indicates that increased use of contraception was the primary cause of the decline.⁵⁵ One study found twelve percent of Whites had babies before age twenty, compared to twenty-seven percent of Blacks.⁵⁶ Another study, using data from 2004, reported that thirty percent of girls in the United States become pregnant at least once as a teen, but this statistic rose to fifty-one percent among Black

52. Darroch et al., *supra* note 1, at 248–49.

53. *Id.* Among fifteen- to seventeen-year-olds, rates of teen pregnancy in the United States were five times that of France. *Id.* at 246. The United States has more pregnancy than any of the other four nations in the study (France, Great Britain, Sweden, and Canada) among ages fifteen, eighteen, and twenty, despite the fact that in each country the age of sexual initiation was similar. *Id.* at 246–47. Youth in the United States were also more likely not to use contraceptives at first intercourse. *Id.* at 248.

54. CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: FINAL DATA FOR 2004, 55 NAT'L VITAL STAT. REP. 1, 6 (2006), available at http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_01.pdf [hereinafter BIRTHS]; TEENAGERS, *supra* note 1, at 11. The rate for Black females declined the most of any racial group since 1990 and that White females aged fifteen to nineteen had forty-one births per thousand, compared to sixty-three per thousand for Black teens of the same age group. BIRTHS, *supra*, at 6. Black teens also have the highest abortion rate. SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., FACT SHEET: TEENAGE PREGNANCY, BIRTH, AND ABORTION 39, 41–42 (2002), available at http://www.siecus.org/pubs/fact/FS_teenage_pregnancy.pdf.

55. JACQUELINE E. DARROCH & SUSHEELA SINGH, GUTTMACHER INST., WHY IS TEENAGE PREGNANCY DECLINING? THE ROLES OF ABSTINENCE, SEXUAL ACTIVITY AND CONTRACEPTIVE USE (1999), available at http://www.guttmacher.org/pubs/or_teen_preg_decline.pdf. The analyses in the study were based upon the responses from the 1988 and 1995 National Survey of Family Growth results, which asked students questions about how frequently they had sex and their methods, if any, of birth control during sex, compared with the rates of teenage pregnancies, births, and abortions during the same time periods. *Id.* at 5. Since the survey relies on students self-reporting, the figures reported may be skewed because students may have provided inaccurate or untruthful answers; however, the risk of error is likely insignificant since the analysis of both 1988 and 1995 relies on self-reported answers. Only one-fourth of the decline was due to more abstinence, while three-fourths resulted because of increased use of contraception and use of more effective contraception. *Id.* at 9–11. A similar study, relying on similar methodology, found that eighty-six percent of the decline in teen pregnancy from 1995 to 2002 was attributable to contraception, specifically more sexually active teens using contraceptives, using more effective methods, and using multiple methods, as opposed to increased abstinence. John S. Santelli et al., *Explaining Recent Declines in Adolescent Pregnancy in the United States: The Contribution of Abstinence and Improved Contraceptive Use*, 97 AM. J. PUB. HEALTH 150, 154–55 (2007). Only twenty-three percent of the decline in teen pregnancies was the result of abstinence for teens aged fifteen to seventeen, and the decline among eighteen- to nineteen-year-olds was entirely attributable to improved contraceptive use. *Id.*

56. TEENAGERS, *supra* note 1, at 11. The same report found that thirty-five percent of Hispanics had a child before the age of twenty. *Id.*

girls in the United States.⁵⁷ Births in the teenage years are “more likely to be unwanted . . . and . . . mistimed” compared to the births of older women, and Black teens have a higher percentage of unwanted births than White and Hispanic teens.⁵⁸ With teen motherhood often comes serious and significant negative consequences for the mother,⁵⁹ the child,⁶⁰ and the nation.⁶¹ Thus, the statistics on teen pregnancy and HIV and STDs among Black youth, as well as Black youth’s outlook on sexuality, aptly illustrate the failure of abstinence-only education.

57. NAT’L CAMPAIGN TO PREVENT TEEN PREGNANCY, FACT SHEET: TEEN SEXUAL ACTIVITY, PREGNANCY AND CHILDBEARING AMONG BLACK TEENS 1 (2008), available at http://www.thenationalcampaign.org/resources/pdf/FactSheet_AfrAmericans.pdf.

58. TEENAGERS, *supra* note 1, at 12.

59. In the Congressional Findings section of the Personal Responsibility Act, Congress included the legislative findings that “[t]he younger the single-parent mother, the less likely she is to finish high school,” and “[y]oung women who have children before finishing high school are more likely to receive welfare assistance for a longer period of time.” Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2113, 42 U.S.C. § 601(a)(1)–(4) (2000).

Domestic violence poses a particular danger to teenage mothers, as “[s]urveys of teen mothers have revealed that a majority of such mothers have histories of sexual and physical abuse, primarily with older adult men.” § 101(7)(C). See Mary Ann Curry et al., *Effects of Abuse on Maternal Complications and Birth Weight in Adult and Adolescent Women*, 92 *OBSTETRICS & GYNECOLOGY* 530, 530–31 (1998) (finding that (1) Black women were significantly more likely to suffer from abuse during pregnancy than White women; (2) 37.6% of adolescents were abused during pregnancy compared to 22.6% of adults; and (3) “abused adolescents were at significantly greater risk for poor weight gain, first- or second-trimester bleeding, smoking, and drug use.”); see also Barbara Parker et al., *Abuse During Pregnancy: Effects on Maternal Complications and Birth Weight in Adult and Teenage Women*, 84 *OBSTETRICS & GYNECOLOGY* 323 (1994).

60. The congressional findings for The Personal Responsibility Act concluded that “[m]others under 20 years of age are at the greatest risk of bearing low birth weight babies,” and “[c]hildren of teenage single parents have lower cognitive scores, lower education aspirations, and a greater likelihood of becoming teenage parents themselves.” § 101(9)(D), (I). Children of African American youth are more likely than children of Caucasian youth to be born premature or with low birth weight, and Black adolescents have higher incidents of fetal death than their White peers. Shih-Chen Chang et al., *Characteristics and Risk Factors for Adverse Birth Outcomes in Pregnant Black Adolescents*, 143 *J. PEDIATRICS* 250, 257 (2003). The high rates of domestic violence among pregnant teens not only endanger the mother but also the child. See Curry et al., *supra* note 59, at 532; Parker et al., *supra* note 59, at 326 (finding that children of women abused during pregnancy were at a substantially increased risk of low birth weight).

61. The congressional findings also reveal the high cost of teenage pregnancy to the nation, especially since “[c]hildren born into families receiving welfare assistance are 3 times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare.” § 101(9)(C). “Between 1985 and 1990, the public cost of births to teenage mothers under the aid to families with dependent children program, the food stamp program, and the medicaid program has been estimated at \$120,000,000,000.” § 101(9)(G). A more recent report estimated that teen childbearing in the United States cost local, state, and federal taxpayers at least \$9.1 billion in 2004, with more than eight billion dollars of those costs attributable to teens aged seventeen and younger. SAUL D. HOFFMAN, *THE NAT’L CAMPAIGN TO PREVENT TEEN PREGNANCY BY THE NUMBERS: THE PUBLIC COSTS OF TEEN CHILDBEARING 2* (2006) available at http://www.thenationalcampaign.org/costs/pdf/report/BTN_National_Report.pdf.

II. HISTORY OF ABSTINENCE-ONLY EDUCATION PROGRAMS

Currently, the federal government funds abstinence-only education through three federal programs, which directly or indirectly target low-income areas. Because many Black youth are in poverty and federally funded abstinence programs are often directed at low-income areas, Black adolescents are more likely to receive abstinence-only education than White adolescents.⁶² In 1981, Congress adopted the Adolescent Family Life Act (AFLA),⁶³ which made federal funding available for the first time to institutions providing abstinence education. The AFLA was enacted in response to the “severe adverse health, social, and economic consequences [caused by] pregnancy and childbirth [to unmarried teens].”⁶⁴ According to the AFLA’s legislative history, one of the Act’s purposes was “to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations.”⁶⁵ For fifteen years, the AFLA remained the government’s sole mechanism for funding abstinence-only education.

In 1996, Congress passed Section 510 of Title V of the Social Security Act⁶⁶ (“Title V”), which provides an alternative source of governmental funding for abstinence-only education. The program, still in effect, promotes the idea “that a mutually faithful monogamous relationship in

62. See Foulkes, *supra* note 6, at 11–12 & nn.47–55 (explaining that Title V funds are allocated based upon the percentage of low-income children in each state, and that even funds that do not go through the state are more likely to be accepted at schools with few resources that cannot turn away free programs).

63. Pub. L. No. 97-35, § 955, 95 Stat. 357 (codified as amended at 42 U.S.C. § 300z (2000)).

64. 42 U.S.C. § 300z(a)(5). For a detailed history of the AFLA, see Rebeka Saul, *Whatever Happened to the Adolescent Family Life Act?*, GUTTMACHER REP. ON PUB. POL’Y, Apr. 1998, at 5 (1998), available at <http://www.guttmacher.org/pubs/tgr/01/2/gr010205.pdf>.

65. 42 U.S.C. § 300z(b)(1). The AFLA has been challenged for unconstitutionally promoting religious values, but the Act withstood constitutional challenge in *Bowen v. Kendrick*, 487 U.S. 589 (1988). The Court held that “any effect of advancing religion” was “at most incidental and remote,” and that the moral views advanced in the AFLA were not necessarily religious in nature. *Id.* at 607. Under the plurality’s rationale in *Mitchell v. Helms*, 530 U.S. 793 (2000), it is likely that both Title V and SPRANS programs, see *infra* notes 75–81 and accompanying text, will withstand scrutiny. Justice Thomas, writing for the plurality, including Chief Justice Rehnquist and Justices Scalia and Kennedy, explained that once the Court finds that government funds are directly or indirectly distributed pursuant to neutral criteria, either to religious or secular organizations, the program receiving the funds is constitutional. *Mitchell*, 530 U.S. at 794–95. Justice O’Connor’s opinion, concurring in the result, reserved room for a successful challenge against using government aid to promote religion, writing “that secular government aid [should] not be diverted to the advancement of religion.” *Id.* at 840–41 (O’Connor, J., concurring). The hope left by Justice O’Connor’s concurrence may be futile with the Court’s new composition. For a detailed discussion of the case, see Elisabeth Divine Reid, *Thou Shalt Honor the Establishment Clause: The Constitutionality of the Faith-Based Initiative*, 28 HAMLINE J. PUB. L. & POL’Y 431, 461–66 (2007).

66. Codified as 42 U.S.C. § 710 (2000).

context of marriage is the expected standard of human sexual activity.”⁶⁷ Title V established an eight-point program defining abstinence education, including having “as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity.”⁶⁸ Implemented under President Clinton, his administration did not require equal emphasis on each element of the eight-point definition.⁶⁹ In contrast, George W. Bush’s administration revised the guidelines to encourage equal emphasis on each of the eight elements.⁷⁰ Under Title V programs, funds are allocated directly to states, which in turn allocate the funds to programs of their choice.⁷¹ While states have a choice of whether to accept the funds, the Administration for Children and Families (ACF) reported that in 2007, forty-three states and three United States territories were scheduled to be appropriated funds.⁷² From 1998 through 2007, fifty million dollars was allocated to these programs annually with the requirement that states accepting the funds match seventy-five percent of the money received through Title V programs.⁷³ The amount each state is eligible to receive from the fifty million dollars depends upon the percentage of low-income students residing in the state: the higher the percentage of low-income students, the more funds the state is eligible to

67. 42 U.S.C. § 710(b)(2)(D).

68. 42 U.S.C. § 710(b)(2)(A). The statute further defines abstinence education as follows: It (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;

...

(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.

42 U.S.C. § 710(b)(2)(B)–(C), (E)–(H).

69. ADVOCATES FOR YOUTH, THE HISTORY OF FEDERAL ABSTINENCE-ONLY FUNDING 2 (2007), available at <http://www.advocatesforyouth.org/publications/factsheet/fshistoryabonly.pdf> [hereinafter HISTORY OF FEDERAL ABSTINENCE-ONLY FUNDING].

70. *Id.*

71. *Id.*

72. ADMIN. FOR CHILDREN & FAMILIES, FACT SHEET: SECTION 510 STATE ABSTINENCE EDUCATION PROGRAM, <http://www.acf.hhs.gov/programs/fysb/content/abstinence/factsheet.htm> (last visited Jan. 16, 2008).

73. *Id.* Funding of Title V programs continues despite a federally funded study concluding that Title V programs were ineffective at delaying initiation of sexual intercourse. See *infra* notes 92–100 and accompanying text (discussing the federally funded study of Title V programs).

receive.⁷⁴ The result is that states with higher populations of Black children receive more aid through Title V programs, which in turn results in more Black children than White children receiving education through programs funded through Title V.⁷⁵

Funding for abstinence-only education increased once again in 2001 under a new federal program, Special Projects of Regional and National Significance (SPRANS), which “provides support for public and private entities to develop and implement abstinence-only education programs for adolescents.”⁷⁶ From the inception of SPRANS in 2001 to 2005, federal funding of abstinence-only education more than doubled from approximately eighty million dollars to one hundred sixty million dollars.⁷⁷ Unlike Title V funds, SPRANS bypasses state approval of federal abstinence funding, allocating funds directly to community-based organizations for abstinence-only education grantees.⁷⁸ Recipients “must teach all [eight] components [on] the eight-point definition” established under Title V,⁷⁹ must target twelve- to eighteen-year-olds, and must not teach about contraceptives.⁸⁰ In fact, “[s]ex education programs that promote the use of contraceptives are not eligible for funding under this [program].”⁸¹

As funding for abstinence-only education has increased, so too has the number of educators propagating abstinence-only curricula. In 1988, only two percent of teachers taught abstinence as the “only way of preventing pregnancy and STDs,” but that percentage increased dramatically to twenty-three percent by 1999.⁸² Of those educators teaching abstinence as the only way of preventing pregnancy and STDs, over sixty percent either presented no information on birth control or presented that birth control

74. 42 U.S.C. § 710(a) (2000) explains that the amount of Title V funds each state shall receive depends upon the percentage determined under 42 U.S.C. § 702(c)(1)(B), which is calculated based on the number of low income children in the state.

75. See Foulkes, *supra* note 6, n.48.

76. MATERNAL & CHILD HEALTH BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., SPRANS COMMUNITY-BASED ABSTINENCE EDUCATION PROJECT GRANT PROGRAM 1, available at [ftp://ftp.hrsa.gov/mchb/abstinence/cbofs.pdf](http://ftp.hrsa.gov/mchb/abstinence/cbofs.pdf) (last visited Mar. 24, 2009).

77. MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., COMM. ON GOV'T REFORM, 108TH CONG., THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 1 (2004) [hereinafter WAXMAN REPORT].

78. Cynthia Dailard, *Abstinence Promotion and Teen Family Planning: The Misguided Drive for Equal Funding*, GUTTMACHER REP. ON PUB. POL'Y, Feb. 2002, at 1, 2 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/1/gr050101.pdf>.

79. *Id.* See *supra* notes 69–70 and accompanying text.

80. Dailard, *supra* note 78, at 2.

81. 70 Fed. Reg. 29318-02, 29320 (May 20, 2005).

82. Jacqueline E. Darroch et al., *Changing Emphases in Sexuality Education in U.S. Public Secondary Schools, 1988–1999*, 32 FAM. PLAN. PERSP. 204, 209 (2000).

was ineffective.⁸³ During the same time period, teachers shifted their primary emphasis from students acting responsibly when making decisions about sex⁸⁴ to students remaining abstinent.⁸⁵

Another study focusing on changes in sex education from 1995 to 2002 corroborates the finding of the continuing trend toward teaching abstinence-only education.⁸⁶ The percentage of students receiving any formal instruction on birth control declined significantly from 1995 to 2002, as did the percentage of students who received education on both birth control and abstinence, resulting in nearly one-third of all teens receiving no formal instruction on birth control.⁸⁷ In contrast, students receiving instruction on only abstinence increased to more than one in five by 2002.⁸⁸ With the increase in recipients of an abstinence-only message came a decline in the recipients' ages; students in 2002 received the message to remain abstinent until marriage two years earlier than their peers in 1995.⁸⁹ Students that did receive information about birth control in 2002 received it two years *after* they received abstinence-only education.⁹⁰ As a result, the majority of Black youth did not receive instruction on birth control before having intercourse: only one in three sexually experienced Black males and fewer than half of sexually experienced Black females had received instruction about birth control methods before they first had sex.⁹¹ Because of the changing emphasis of sex education, sexually active students often received abstinence education, but not birth control instruction, prior to their first sexual intercourse.

83. *Id.* at 210.

84. The authors characterized the following as teaching students to act responsibly: "decision-making or making responsible choices, consequences of sexual activity, consequences of parenthood, male responsibility, and recognizing risky situations." *Id.* at 206.

85. *Id.*

86. Duberstein et al., *supra* note 37.

87. *Id.* at 184–86. In 1995, seventy percent of boys had instruction on birth control before age fifteen and eighty percent by age sixteen, compared to only sixty-seven percent by age eighteen in 2002. *Id.* at 186. The percentage of eighteen-year-old girls receiving instruction on birth control likewise declined from ninety percent in 1995 to seventy-one percent in 2002. *Id.* From 1995 to 2002, the proportion of girls receiving abstinence-plus education declined from eighty-four to sixty-five percent. *Id.* at 184. Additionally, ten percent of boys and nine percent of girls received no formal instruction on sex education. *Id.*

88. *Id.*

89. *Id.* at 185.

90. *Id.* at 185–86.

91. *Id.* at 186. For statistics on the percentage of teens overall receiving instruction on birth control, see *supra* note 87.

III. COMPARATIVE ANALYSIS OF ABSTINENCE-ONLY AND COMPREHENSIVE SEX EDUCATION PROGRAMS

A. *Abstinence-Only Programs are Significantly Less Effective than Comprehensive Programs*

Despite the increase in abstinence-only education and its funding, the programs have not met their purported goal of delaying sexual initiation.⁹² A federally sponsored report, published in 2007, evaluated four widely used abstinence-only education programs funded under Title V (“Title V programs”).⁹³ An interim version of the report showed no change in students’ expectations to abstain from sexual intercourse⁹⁴ and the final report not only confirmed the interim report’s findings, but also concluded that the students receiving abstinence-only education initiated sex at the same mean age and had the same number of partners as those not receiving any message whatsoever about sexual intercourse.⁹⁵ Students lacking any type of exposure to sex education were equally likely to use contraception as those receiving a message to remain abstinent.⁹⁶

92. See *supra* notes 66–68 and accompanying text (discussing the goals of abstinence-only education).

93. CHRISTOPHER TRENHOLM ET AL., MATHEMATICA POLICY RESEARCH, INC., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS: FINAL REPORT 1 (2007), available at <http://www.mathematica-mpr.com/publications/pdfs/impactabstinence.pdf>. See *supra* notes 66–68 and accompanying text for an explanation of Title V. Prior to the study, analysis of abstinence-only education was sparse. Concerning the evaluation of abstinence-only programs prior to the release of the Mathematica Policy Research study, Dr. Douglas Kirby, see *infra* notes 112–13 and accompanying text, noted:

Very little rigorous evaluation of abstinence-only programs has been completed; in fact, only three studies met the criteria for this review. . . . None of the three evaluated programs showed an overall positive effect on sexual behavior, nor did they affect contraceptive use among sexually active participants. However, given the paucity of the research and the great diversity of abstinence-only programs that is not reflected in these three studies, one should be very careful about drawing conclusions about abstinence-only programs in general. Fortunately, results from a well-designed, federally-sponsored evaluation of Title V-funded abstinence programs should be available within the next two years.

[In contrast] [a] large body of evaluation research clearly shows that sex and HIV education programs included in this review do not increase sexual activity—they do not hasten the onset of sex, increase the frequency of sex, nor increase the number of sexual partners. To the contrary, some sex and HIV education programs delay the onset of sex, reduce the frequency of sex, or reduce the number of sexual partners.

DOUGLAS KIRBY, THE NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SUMMARY: EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY 8 (2001).

94. REBECCA A. MAYNARD ET AL., MATHEMATICA POLICY RESEARCH, INC., FIRST-YEAR IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS 56 (2005), available at <http://www.mathematica-mpr.com/publications/pdfs/firstyearabstinence.pdf>.

95. TRENHOLM ET AL., *supra* note 93, at 29.

96. *Id.*

Furthermore, the reluctance of youth in abstinence-only programs to use condoms was probably influenced by misleading information perpetuated by the programs. Recipients of an abstinence-only message were significantly less likely to believe condoms effectively prevent STIs than youth not receiving any message about sexuality.⁹⁷ Youth exposed to abstinence-only curricula were both less likely to report that condoms usually prevent STIs and more likely to report condoms as never an effective means of disease prevention than those who received no sex education.⁹⁸ Students, both those receiving a message to abstain from sex and those receiving no message about sex, exhibited a lack of knowledge concerning STDs; on average, each group failed to identify the health consequences of an STD nearly fifty percent of the time.⁹⁹ Also, less than sixty percent of each group correctly answered that birth control pills, used properly, “usually prevent pregnancy.”¹⁰⁰ The results, taken as a whole, undermine the effectiveness of abstinence-only education and support comprehensive sex education, as youth receiving either a message to remain abstinent or no message about sex lacked adequate knowledge about STIs and contraception in order to make fully informed decisions about sex. However, with the more stringent requirements under the better-funded SPRANS programs, students are likely to receive even less of the information they need.

State evaluations of Title V programs,¹⁰¹ available from ten states, reached conclusions similar to the federally funded study discussed above, and demonstrate the ineffectiveness of abstinence-only education. None of the programs resulted in a “sustained . . . impact on attitudes or intentions” regarding sex, nor did any of the programs show any evidence of successfully reducing “sexual risk-taking behaviors.”¹⁰² In fact,

97. *Id.* at 44–45.

98. *Id.* One of the four programs studied did show a large improvement in students correctly reporting that birth control pills never prevent HIV, but the other three programs did not and about thirty percent of youth both in and out of the latter programs were unaware that birth control pills do not prevent HIV, further demonstrating the need for comprehensive sex education. *Id.* at 48. See *infra* notes 140, 146 and accompanying text for a discussion of the effectiveness of condoms.

99. *Id.* at 43.

100. *Id.* at 47.

101. See *supra* notes 66–74 and accompanying text.

102. DEBRA HAUSER, ADVOCATES FOR YOUTH, FIVE YEARS OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION: ASSESSING THE IMPACT 4 (2004), available at <http://www.advocatesforyouth.org/publications/stateevaluations.pdf>. “[O]nly in one state did any program” have “short-term success in delaying” youth’s timing of initiating sex, and “none of [the] programs” had long-term success. *Id.* States for which data were available were: Arizona, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania, Washington, Missouri, and Nebraska. *Id.* at 1. The report also assessed the abstinence-

researchers found some negative impact on youth's willingness to use contraception because of the abstinence-only programs' emphasis on contraception failure rates.¹⁰³ The results of this study and the federally funded study of Title V programs¹⁰⁴ probably account for fewer states accepting Title V funds. For the first five years of Title V programs, every state accepted Title V funds except California, which had previously experimented with and abandoned abstinence-only education.¹⁰⁵ In contrast, the ACF's website reports that forty-three states were scheduled to receive funds in 2007,¹⁰⁶ while another report indicates that forty-two states accepted the funds.¹⁰⁷ The results from the multiple reviews of Title V programs, in combination with fewer states accepting federal funds designated for such programs, demonstrates the ineffectiveness of abstinence-only programs.

The Heritage Foundation, a conservative policy think tank and supporter of abstinence-only education, contends that ten types of abstinence-only programs effectively alter sexual behavior.¹⁰⁸ Two of the ten programs the Heritage Foundation advocates involve virginity pledges and rely on studies finding that virginity pledges delay adolescent sexual initiation.¹⁰⁹ But the Heritage Foundation omits the fact that pledgers, when initiating sex, were significantly less likely to use contraception than their non-pledging counterparts,¹¹⁰ and further omits that pledging works only in certain contexts.¹¹¹ Also, Dr. Douglas Kirby,¹¹² author of *Emerging*

only programs California implemented in 1991 and abandoned in 1996 when evaluation results proved the initiative ineffective, prior to Title V programs. *Id.* at 1.

103. *Id.* at 4. "Arizona's evaluation team found that program participants' attitudes about birth control became less favorable from pre- to posttest. They noted that this was probably a result of the 'program's focus on the failure rates of contraceptives as opposed to their availability, use and access.'" *Id.*

104. See *supra* notes 92–100 and accompanying text.

105. HAUSER, *supra* note 102, at 1.

106. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 72.

107. See HISTORY OF FEDERAL ABSTINENCE-ONLY FUNDING, *supra* note 69, at 2 (explaining that the following eight states rejected federal funds in 2007: "California, Connecticut, Maine, New Jersey, Montana, Ohio, Rhode Island, and Wisconsin").

108. Robert Rector, *The Effectiveness of Abstinence Education Programs in Reducing Sexual Activity Among Youth*, BACKGROUND, Apr. 5, 2002, at 1, 5–8 (2002), available at http://www.heritage.org/research/family/upload/6203_1.pdf. The ten programs are (1) "Virginity Pledge Programs"; (2) "Not Me, Not Now"; (3) "Operation Keepsake"; (4) "Abstinence by Choice"; (5) "Virginity Pledge Movement"; (6) "Teen Aid and Sex Respect"; (7) "Family Accountability Communicating Teen Sexuality (FACTS)"; (8) "Postponing Sexual Involvement (PSI)"; (9) "Project Taking Charge"; and (10) "Teen Aid Family Life Education Project." *Id.*

109. *Id.* at 5, 6.

110. Peter S. Bearman & Hanna Brückner, *Promising the Future: Virginity Pledges and First Intercourse*, 106 AM. J. SOC., 859, 898–900 (2001).

111. *Id.* at 902. The study also found that if too many students pledge, the pledge effect

Answers 2007,¹¹³ responded to the Heritage Foundation's report, noting that, of the ten programs that the Heritage Foundation advocates, nine "failed to provide credible evidence . . . that they delayed the initiation of sex or reduced the frequency of sex."¹¹⁴ He concluded, in 2002, "[t]here do not currently exist any abstinence-only programs with strong evidence that they either delay sex or reduce teenage pregnancy."¹¹⁵

In *Emerging Answers 2007*, Dr. Kirby reached the same conclusion, but this time, "[s]everal abstinence programs, including abstinence-until-marriage programs, [had] been *rigorously* evaluated in experimental studies with large samples and found to have no overall impact on delay of initiation of sex, age of initiation of sex, return to abstinence, number of

disappears, which happened at one-third of the schools involved. *Id.* The students at these schools transitioned at the same rate as nonpledging peers into sex. *Id.* See also Hanna Brückner & Peter S. Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. ADOLESCENT HEALTH 271, 277 (2005) (finding that students taking virginity pledges had the same rate of STD infection as their non-pledging peers).

112. Dr. Kirby is recognized as a leading researcher in the study of sex education programs. The National Campaign to Prevent Teen and Unplanned Pregnancy, the non-profit organization supporting his research, wrote that "[w]hen it comes to helping understand what programs work best to prevent teen pregnancy, [Dr. Kirby's] contributions are unmatched." DOUGLAS KIRBY, THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, EMERGING ANSWERS 2007: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY AND SEXUALLY TRANSMITTED DISEASES 2 (2007), available at http://www.thenationalcampaign.org/EA2007/EA2007_full.pdf [hereinafter EMERGING ANSWERS 2007].

113. *Id.*

Emerging Answers 2007 is part of the National Campaign's "Putting What Works to Work" (PWWTW) project, an effort to publish and disseminate the latest research on teen pregnancy in straightforward, easy-to understand language and provide clear implications for policy, programs, and parents. PWWTW is funded by the Centers for Disease Control and Prevention (CDC)

Id.

114. DOUGLAS KIRBY, THE NAT'L CAMPAIGN TO PREVENT TEEN & UNWANTED PREGNANCY, DO ABSTINENCE-ONLY PROGRAMS DELAY THE INITIATION OF SEX AMONG YOUNG PEOPLE AND REDUCE TEEN PREGNANCY? 5 (2002), available at http://www.thenationalcampaign.org/resources/pdf/pubs/abstinence_only.pdf.

115. *Id.* at 6. He remains open to the possibility that abstinence-only education could prove effective, but

given the great diversity of abstinence-only programs combined with very few rigorous studies of their impact, there is simply too little evidence to know whether abstinence-only programs delay the initiation of sex. . . .

These conclusions are in contrast to the studies of "abstinence-plus" programs . . . [that] [m]any studies with very strong research designs have demonstrated that specific programs, as well as groups of programs with common characteristics, can delay sexual intercourse, reduce its frequency, increase condom use and/or increase contraceptive use.

Id. However, I am not so optimistic, particularly considering the results of the federally funded study of Title V programs and other studies with similar results. See *supra* notes 86–100 and accompanying text, which discuss the results of studies reviewing abstinence-only programs.

sexual partners, or use of condoms or other contraceptives.”¹¹⁶ In contrast, analysis of nearly fifty comprehensive sex and STD/HIV education programs shows “strong evidence . . . that these programs do not increase sexual activity and, moreover, that some of them reduce sexual activity, increase the use of condoms or other contraceptives, or both.”¹¹⁷ Specifically, fifteen of thirty-two programs, or forty-seven percent, “delayed the initiation of sex,” while none hastened its onset.¹¹⁸ Eleven of twenty-four reduced the number of sexual partners; fifteen of thirty-two “increased condom use”; four of nine “increased the use of other contraceptives”; and fifteen of twenty-four reduced sexual risk taking¹¹⁹ through successfully advocating changing certain types of behavior, including increasing contraceptive use.¹²⁰ Seventeen of nineteen programs that measured the impact on students’ knowledge of HIV found the program successfully increased knowledge of the disease, including methods to avoid acquiring it.¹²¹ Additionally, half of the programs were able to increase students’ perceptions of the risk of acquiring HIV.¹²² Thus, studies consistently reveal the ineffectiveness of abstinence-only programs and that comprehensive sex education can and has been shown to effectively promote birth control without causing earlier sexual initiation.

Emerging Answers 2007 did note that effective comprehensive sex education programs did not “*dramatically* reduce risky . . . behavior” and rates of STIs,¹²³ but maintained the position that the study’s findings “are very encouraging. [The results] indicate that some programs can significantly reduce rates of teen pregnancy, childbearing, or STD, even though most studies simply do not have sufficient statistical power to detect the reductions.”¹²⁴ Also, the report found that program effectiveness depended on context,¹²⁵ and that some programs were effective at

116. EMERGING ANSWERS 2007, *supra* note 112, at 102.

117. *Id.* The author explains that the comprehensive sex education programs had different aims and therefore measured different results, accounting for the different number of studies in each category. *Id.* at 105. Of the fifty-six programs included in the study, (eight of which were abstinence-only programs), “[eight] . . . focused only on reducing teen pregnancy, [twenty-four] . . . focused only on preventing the spread of STD/HIV, and [twenty-four] . . . focused on both.” *Id.*

118. *Id.* at 115.

119. The term refers to unsafe sexual behavior, including, but not limited to, having unprotected sex, and having unprotected sex with more than one partner. *Id.* at 111.

120. *Id.* at 102.

121. *Id.* at 118–19.

122. *Id.* at 118.

123. *Id.* at 102.

124. *Id.* at 115.

125. See *supra* note 14 (recognizing that, for a sex education program to be successful, it must

increasing contraceptive use in low-income and urban communities,¹²⁶ which supports implementing comprehensive sex education to help reduce the incidents of diseases and teenage pregnancy among Black youth. Further supporting implementing comprehensive sex education, a majority of the programs ranged from six to fifteen hours of instruction, and less than ten percent were over twenty hours.¹²⁷ Programs of sufficient length are likely to be more effective at achieving their goals of increasing both contraceptive use and abstinence. Also, all of the comprehensive sex education programs Dr. Kirby reviewed lacked the backing of federal funds. Each factor suggests that comprehensive sex education, designed properly for its audience, with proper length of instruction, and adequate funding, can continue to lower the risk of youth engaging in unprotected sex.

Emerging Answers 2007 provides strong evidence that comprehensive sex education programs are successful in reducing sexual risk behaviors. Another recent meta-analysis reached similar conclusions.¹²⁸ It reviewed studies of both comprehensive and abstinence-only sex education programs, finding seven of ten comprehensive programs increased contraceptive use, with at least one showing effects lasting “at least thirty months.”¹²⁹ In contrast, only one in four abstinence-only programs delayed initiation of intercourse.¹³⁰ Data measuring teens’ attitudes towards sex also suggest that comprehensive sex education increases sexual responsibility.¹³¹ For example, the greater boys’ actual knowledge about AIDS, the more likely they are to believe that “engaging in [preventive] behaviors is important” and to demonstrate greater self efficacy in controlling sexual urges and participating in safe sex activities.¹³² This

take several contextual factors into account); *see also infra* notes 182–83 and accompanying text (analyzing the powerful impact of neighborhood factors on sexual behavior).

126. *Id.* at 115–17.

127. *Id.* at 106. Only two percent lasted an hour or less, twenty-one percent ranged from two to five hours, twenty-five percent were six to ten hours, twenty-seven percent were eleven to fifteen hours, sixteen percent were sixteen to twenty hours, and nine percent were greater than twenty hours.

Id.

128. Sylvana E. Bennett & Nassim P. Assefi, *School-Based Teenage Pregnancy Prevention Programs: A Systematic Review of Randomized Controlled Trials*, 36 J. ADOLESCENT HEALTH 72 (2005).

129. *Id.* at 79, 80. The study did not track participants beyond thirty months, thus it is unknown whether the effects lasted longer. One of the studies reviewed analyzed both an abstinence-plus and abstinence-only program, finding that students in the former group were much less likely to have unprotected sex than those receiving that latter message. *Id.* at 77.

130. *Id.* at 78. Two of thirteen abstinence-plus programs also delayed initiation of sexual intercourse. *Id.*

131. Stevenson et al., *supra* note 14, at 320–21.

132. *Id.*

finding suggests that comprehensive sex education has the potential to reduce incidents of HIV among all youth because fewer boys will have unprotected sex, which will result in fewer girls having unprotected sex. Increased knowledge and self-efficacy could be particularly helpful to Black male youth, the group at most risk of acquiring the disease,¹³³ because they will be aware of the importance of safe sex and have the necessary information to protect themselves that they now lack. Overall, teens with a high amount of actual knowledge about HIV displayed a stronger endorsement of beliefs that encouraged prevention behaviors than those lacking knowledge about the disease.¹³⁴ Thus, imparting knowledge to youth of the dangers associated with sex is likely to reduce the rates of STIs because it provides youth with the knowledge needed to protect themselves.

B. Abstinence-Only Programs Generally Propagate Inaccurate Information

Abstinence education has proven not only ineffective but also medically inaccurate. Astonishingly, eleven of the thirteen curricula most commonly used by SPRANS programs¹³⁵ contain “major errors and distortions of public health information.”¹³⁶ Several of the programs contain false or misleading information about the effectiveness of contraceptives, including citing a study¹³⁷ as authority that has been discredited by health officials, including the CDC.¹³⁸ The study concluded that condoms reduce HIV transmission by only sixty-nine percent, but the Department of Health and Human Services rejected this conclusion and issued a statement to the public informing it that the CDC believed the analysis was “flawed” and the calculation of the effectiveness of condoms was based on “serious error.”¹³⁹ In fact, the CDC, along with the Food and Drug Administration, the National Institutes of Health, and the United

133. See *supra* Part I.B.

134. Stevenson et al., *supra* note 14, at 320–21. The study found other positive results, including that perceived AIDS knowledge led to self-control for males and self-efficacy for females. *Id.*

135. See *supra* notes 76–81 and accompanying text.

136. WAXMAN REPORT, *supra* note 77, at 7 (citations omitted). The curricula with errors were used in “[twenty-five] states by [sixty-nine] grantees” that have received over \$90,000,000 in federal funds since 2001. *Id.* (citations omitted).

137. Susan Weller, *A Meta-Analysis of Condom Effectiveness in Reducing Sexually Transmitted HIV*, 36 SOC. SCI. & MED. 1635 (1993).

138. WAXMAN REPORT, *supra* note 77, at 8 (noting gross inaccuracies contained in the Weller study).

139. *Id.* (citing DEP’T OF HEALTH AND HUMAN SERVS., BACKGROUND ON THE WELLER STUDY (1997)).

States Agency for International Development, maintains that “[l]atex condoms, when used consistently and correctly, are highly effective in preventing the transmission of HIV In addition, correct and consistent use of latex condoms can reduce the risk of other sexually transmitted diseases”¹⁴⁰ Despite the CDC’s position, several abstinence-only curricula continue to rely on the discredited study, with one curriculum purporting that condoms fail to prevent HIV approximately thirty-one percent of the time.¹⁴¹ Some abstinence-only programs teach the falsity that HIV and other pathogens can “‘pass through’” condoms.¹⁴² Such programs also instruct that condoms are not effective at preventing other STDs, despite the CDC’s contrary position.¹⁴³

Programs relying on erroneous information are having predictable, albeit negative, effects on instructors, and thereby students. The percentage of teachers instructing that condoms could be an effective means of preventing STDs declined dramatically between 1988 and 1999, from eighty-seven percent to fifty-nine percent.¹⁴⁴ Since abstinence-only programs do not cause students to delay intercourse¹⁴⁵ and fewer students today receive information about condoms than in the past, abstinence-only programs are likely to increase the chances of youths acquiring an STD. Additionally, while all abstinence-only programs fail to instruct students about how to use birth control properly and effectively, several exaggerate condom failure rates in preventing pregnancy.¹⁴⁶ This too is influencing

140. CTRS. FOR DISEASE CONTROL & PREVENTION, MALE LATEX CONDOMS AND SEXUALLY TRANSMITTED DISEASES 2 (2003), available at <http://www.cdc.gov/nchstp/od/condoms.pdf>. The publication resulted from a workshop convened by the National Institutes of Health that reviewed the published evidence that established the “effectiveness of the latex male condom in preventing STDs, including HIV.” *Id.* at 1. The CDC, in discrediting Weller’s study, see *supra* note 138, cited two studies that relied on larger sample sizes and were conducted over several years, and concluded that the studies have demonstrated that condoms are highly effective at preventing HIV infections. WAXMAN REPORT, *supra* note 77, at 9 n.30. For specific statistics on condoms’ effectiveness, see *infra* note 146.

141. WAXMAN REPORT, *supra* note 77, at 9 (citing TEEN-AID, INC., ME, MY WORLD, MY FUTURE (n.d.)).

142. *Id.*

143. *Id.* at 10–11.

144. Darroch et al., *supra* note 82, at 209.

145. See *supra* notes 92–103 and accompanying text.

146. WAXMAN REPORT, *supra* note 77, at 11–12. The programs fail to distinguish between the failure rate of how condoms are typically used, ten to fourteen percent, and the failure rate for perfect use, two to three percent. *Id.* (citing James Trussell, *Contraceptive Failure in the United States*, 70 CONTRACEPTION 89 (2004)). See also WORLD HEALTH ORG., EFFECTIVENESS OF MALE LATEX CONDOMS IN PROTECTING AGAINST PREGNANCY AND SEXUALLY TRANSMITTED INFECTIONS (2000), available at <http://www.who.int/mediacentre/factsheets/fs243/en/print.html>. The programs also fail to include that the failure rate represents the risk over a twelve month period, not the risk of pregnancy at each incident of intercourse. WAXMAN REPORT, *supra* note 77, at 12. The World Health Organization

teachers; of all educators teaching abstinence as the only way of preventing pregnancy, forty-two percent instructed that birth control was ineffective.¹⁴⁷ Students being misinformed could lead to an increased risk of pregnancy and STIs because they are unaware of the protections available to them.

C. Popular Support for Comprehensive Sex Education

Proponents of abstinence-only education often argue that parents have a right to control sex education, and this argument has, at times, gained leverage with the courts.¹⁴⁸ Assuming parents have a right to control sex education actually favors comprehensive sex education. Opinion polls consistently demonstrate parents overwhelmingly support comprehensive sex education.¹⁴⁹ A survey of North Carolina parents showed that eighty-nine percent supported comprehensive sex education, which sharply contrasts with the fact that North Carolina was one of the first states to implement an “abstinence-until-marriage curriculum in 1995.”¹⁵⁰ Nationally, eighty-eight percent of parents say “all aspects including birth control and safer sex” should be taught in high school.¹⁵¹ Despite such

explains that the higher rate for typical use is “due primarily to inconsistent and incorrect use, not to condom failure. Condom failure—the device breaking or slipping off completely during intercourse—is uncommon.” WORLD HEALTH ORG., *supra*.

147. Darroch et al., *supra* note 82, at 209.

148. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding enforcement of mandatory public education laws interfered with parents’ rights to homeschool children for religious reasons); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (ruling an act that mandated children’s attendance at public school unreasonably interfered with parents’ rights to direct their children’s education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding a law that forbade teaching foreign languages to students below ninth grade materially interfered with the power of parents to control the education of their children). Cf. *infra* note 152, discussing cases moving away from parental control of their children’s education.

149. Amy Bleakley et al., *Public Opinion on Sex Education in US Schools*, 160 ARCHIVES PEDIATRICS & ADOLESCENT MED. 1151 (2006); Kristin E. Ito et al., *Parent Opinion of Sexuality Education in a State with Mandated Abstinence Education: Does Policy Match Parental Preference?*, 39 J. ADOLESCENT HEALTH 634 (2006); see also KIRBY, *supra* note 112, at 104 (finding overwhelming public support for comprehensive sex education regardless of the sponsoring organization’s political affiliation and citing a survey of the Heritage Foundation, a conservative organization, which demonstrates public support of comprehensive sex education).

150. Ito et al., *supra* note 149, at 634, 635.

151. KAISER FAMILY FOUNDATION ET AL., *SEX EDUCATION IN AMERICA* 32 tbl.24 (2000), available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13531>. Ninety-eight percent of parents supported teaching about HIV and STDs; ninety-four percent supported instruction on how to deal with pressure to have sex and how to deal with emotional consequences of sex; ninety-two percent supported education on how to get tested for AIDS and STDs; ninety percent on how to obtain birth control; and eighty-five percent on how to use condoms properly. *Id.*

overwhelming support for comprehensive education, politicians have enacted legislation forbidding funding of programs that teach about contraceptives. This suggests that other factors are motivating politicians to support abstinence-only programs.

In addition to popular support of comprehensive sex education among parents, courts are increasingly limiting parental control over their children's education.¹⁵² While parental control over their children has been eroding, minors' rights, in some contexts, have been recognized, particularly their rights to access contraceptives¹⁵³ and abortion.¹⁵⁴ Both the shift away from parental rights and scholarship arguing for minors' autonomy¹⁵⁵ support considering students' views in the sex education debate, and students overwhelmingly support comprehensive sex education, with more than ninety percent believing "sex education should be mandatory in high schools."¹⁵⁶ Black youth had the highest rate of supporting mandatory sex education with ninety-three percent, while ninety-two percent of Hispanics and ninety percent of Whites supported

152. See *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005) (holding that any interference with parental decision-making authority did not reach a constitutional level when students participated in a survey about sexual activity); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005), *cert. denied*, 549 U.S. 1089 (2006) (concluding that parents possess no constitutional right to prevent school district from providing information on sex to students in the forum or manner selected by the school district and that a psychological survey asking students about views on sex was reasonable state action pursuant to legitimate educational interests); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (holding that mandatory student attendance at sexually explicit AIDS awareness assembly did not intrude on constitutional rights of parents to direct upbringing and control of their children); see also Robert Kubica, *Let's Talk About Sex: School Surveys and Parents' Fundamental Right to Make Decisions Concerning the Upbringing of Their Children*, 51 VILL. L. REV. 1085 (2006); Ralph D. Mawdsley, *The Changing Face of Parents' Rights*, 2003 BYU EDUC. & L.J. 165. *But see* Jesse R. Merriam, *Why Don't More Public Schools Teach Sex Education?: A Constitutional Explanation and Critique*, 13 WM. & MARY J. WOMEN & L. 539 (arguing the Constitution does not support an argument for constitutionally mandated sex education, but it would be constitutionally mandated to exempt students from mandatory sex education instruction).

153. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977) (recognizing a minor's Fourteenth Amendment right to privacy "in connection with decisions affecting procreation"); see also Jessica R. Arons, *Misconceived Laws: The Irrationality of Parental Involvement Requirements for Contraception*, 41 WM. & MARY L. REV. 1093 (2000) (describing governmental attempts to require parental involvement in minors' access to contraception and criticizing parental notification laws as irrational because they put teens in harm's way and have the opposite of intended effect).

154. *Bellotti v. Baird*, 443 U.S. 622 (1979) (holding mature minors have constitutional right to obtain an abortion without parental consent).

155. See Ross, *supra* note 10. Ross argues that mature minors have liberty interests independent of their parents, and since "maturation is a gradual process," minors' claims to autonomy gain credibility as they get older and develop cognitively. *Id.* at 244. The latter part of her argument is consistent with the proposition that effective sex education programs match students' cognitive abilities. See Steinberg, *supra* note 8, at 66; see also Beh & Diamond, *supra* note 7; Levesque, *supra* note 12.

156. COHEN ET AL., *supra* note 17, at 12.

mandatory sex education.¹⁵⁷ The higher percentage among Black and Hispanic youth implies that minority youth recognize both the importance of accurate sex education and their need for such education. A survey of students in 1999 revealed: fifty-one percent of students said they needed more information on how to get tested for HIV and STDs; forty-seven percent needed more information on AIDS; fifty percent needed more information on STDs other than HIV/AIDS; and forty-six percent needed more information about birth control and how to deal with pressure to have sex.¹⁵⁸ Students did not indicate that they needed more information on abstinence. In fact, more than seventy-five percent of youth oppose government funding of abstinence-only education.¹⁵⁹ However, with current funding for such programs, abstinence until marriage is increasingly the message that youth are exposed to while they are decreasingly instructed on the topics that they actively assert they need more information.¹⁶⁰

Teachers' views accord with students' and, considering the amount of contact teachers have with students, it is reasonable to assume they have an accurate awareness of students' sexual education needs.¹⁶¹ Ninety-eight percent of teachers believe that by the end of grade twelve, students should have had courses on puberty, HIV transmission, STDs, how to resist peer pressure, "implications of teenage parenthood," abstinence, dating, sexual abuse, and "nonsexual ways to show affection."¹⁶² Despite teachers'

157. *Id.*

158. KAISER FAMILY FOUNDATION ET AL., *supra* note 151, at 36. Forty percent reported they needed to know more about how to use and where to get birth control. *Id.*

159. COHEN ET AL., *supra* note 17, at 12. White youth were more likely to disagree with federal funding of abstinence-only education than Black youth; eighty-one percent of White youth opposed federal funding compared to seventy-six percent of Black youth. *Id.* Instead of implying that Black youth are more supportive of abstinence-only education, this statistic probably reflects Black youth's recognition that federal funding may provide the only source of sex education. Strengthening this contention is the statistic that Black youth are more likely to believe "condoms should be available in high schools" (seventy-six percent) than White youth (sixty-eight percent). *Id.*

160. That students consistently report needing more information on sex corresponds with the trend that abstinence until marriage is becomingly increasingly rare in a changing American society. According to a recent study published in *Public Health Reports*, by age forty-four, ninety-nine percent of Americans have had sex, ninety-five percent did so before marriage, and seventy-four percent did so before the age of twenty. Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73 (2007). Of twenty-year-old abstainers, eighty-one percent eventually have premarital sex. *Id.* Based on the increase of premarital sex, especially within the adolescent years, it seems that the insistence on abstinence-only sex education ought to end. Instead, consistent with the change in American mores, a comprehensive sex education program seems more compatible with the new acceptance of premarital sex.

161. Their views are at least arguably more akin to students' needs than political representatives who have little to no awareness of students' needs, particularly Black and impoverished youth.

162. Darroch et al., *supra* note 82, at 206–07.

opinions, these topics were less likely to be covered than teachers thought they should be, particularly nonsexual ways to show affection and where to go for birth control.¹⁶³

Further demonstrating popular support for comprehensive sex education, a number of professional organizations publicly criticize abstinence-only education. The Society for Adolescent Medicine¹⁶⁴ authored a position paper declaring, “[i]t is unethical to provide misinformation or withhold information about sexual health that teens need in order to protect themselves from STIs and unintended pregnancy.”¹⁶⁵ Many abstinence-only programs directly provide misinformation¹⁶⁶ and, under the strict definition of abstinence education, withhold information about birth control,¹⁶⁷ constituting unethical disregard for minors and their health needs. The Black AIDS Institute¹⁶⁸ strongly condemns abstinence-only education, asserting:

These programs restrict important information concerning HIV/AIDS that young African Americans need. With HIV and AIDS ravaging youth communities across the country, religious leaders, community organizations, schools, and political leaders must support techniques and programs such as sex education that have proven to be effective at protecting our youth. Fundamental to all such efforts has to be the provision of accurate and truthful

163. *Id.* at 207–08. Studies corroborate teachers’ assessment of students’ sexual education needs. Concerning alternative methods of showing sexual affection, one study found that African Americans regularly forego foreplay in favor of sexual intercourse, thus teaching or encouraging nonpenetrative sex could be a more effective means to delay sex and its corresponding risks than abstinence-only education for African American youth. Stanton et al., *supra* note 41, at 967–69.

Furthermore, although scholarship recognizes that successful sex education programs need to include student participation, only fifty-five percent of teachers say their most recent sex education course stressed student participation. KAISER FAMILY FOUNDATION ET AL., *supra* note 151, at 16. And, despite that effective sex education programs teach methods to resist sexual pressure, “no more than half [of educators] talked about how to negotiate sexual limits.” Darroch et al., *supra* note 82, at 208. Also, in 1999, in most grades, implications of teenage parenthood, birth control methods, and “nonsexual ways to show affection were significantly less likely to be taught than abstinence.” *Id.* at 207.

164. “SAM is a multi-disciplinary organization of health professionals who are committed to advancing the health and well-being of adolescents.” The Society for Adolescent Medicine, <http://www.adolescenthealth.org/> (last visited Apr. 3, 2009).

165. John Santelli et al., *Abstinence-Only Education Policies and Programs: A Position Paper of the Society for Adolescent Medicine*, 38 J. ADOLESCENT HEALTH 83, 86 (2006).

166. *See supra* Part III.B.

167. *See supra* note 87 and accompanying text.

168. “The Black AIDS Institute is the first Black HIV/AIDS policy center dedicated to reducing HIV/AIDS health disparities by mobilizing Black institutions and individuals in efforts to confront the epidemic in their communities.” Black AIDS Institute, About the Institute, <http://www.blackaids.org/> (follow “About the Institute” hyperlink) (last visited Mar. 30, 2009).

information. How will we explain to young people who become infected because they did not know how to use a condom that we kept that information from them in order to maintain our moral vision of what their lives should be, instead of confronting the challenges they are actually facing?¹⁶⁹

The CDC advocates a strategy of beginning HIV/AIDS education at ages corresponding to initiation of sexual intercourse.¹⁷⁰ Currently, however, Black males often do not receive any sexual education, except a message to remain abstinent, before initiating sexual education.¹⁷¹

IV. LEGAL FRAMEWORK FOR A RIGHT TO COMPREHENSIVE SEX EDUCATION

Although the Supreme Court has held education is not a fundamental interest protected by the Equal Protection Clause, the Court's decision in *Plyler v. Doe*¹⁷² lays the framework for recognizing students' rights to comprehensive sex education. The decision in *Plyler* is inconsistent with the federal statutes funding abstinence-only education and, therefore, applying the precedent from *Plyler* would preclude the federal government from funding abstinence-only education. Although the Court in *Plyler* purportedly remained true to the idea that education is not a fundamental interest protected by equal protection,¹⁷³ the Court nonetheless recognized

169. COHEN ET AL., *supra* note 33, at 43.

170. HIV/AIDS AMONG YOUTH, *supra* note 34, at 2.

171. See *supra* notes 82–91 and accompanying text.

172. 457 U.S. 202 (1982).

173. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). For a discussion of contexts where the court has recognized a fundamental interest, see *id.* at 46; *id.* at 61 & n.8 (Stewart, J., concurring); *id.* at 97–98 (Marshall, J., dissenting).

The Court later related that it is still undecided whether the right to a “minimally adequate” education is protected under equal protection. See *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”). It has been argued extensively by scholars that *Rodriguez* was wrongly decided and that education should be a fundamental interest protected under equal protection jurisprudence. See Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004) (arguing *Rodriguez* was “wrong—tragically wrong—in holding that there is not a fundamental right to education. Education is essential for the exercise of constitutional rights, for economic opportunity, and ultimately for achieving equality.”); Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 296 (1993) (“The Constitution can be interpreted to include a fundamental right to education.”); Ian Millhiser, Note, *What Happens to a Dream Deferred?: Cleansing the Taint of San Antonio Independent School District v. Rodriguez*, 55 DUKE L.J. 405 (2005) (arguing that there should be a constitutional right to education and protection of that interest must come from the courts). It has also been argued that a lesser right to a minimally adequate education should be recognized by the Court.

that children of illegal immigrants could not be denied public education without a showing of a compelling government interest under equal protection analysis.¹⁷⁴

In *Plyler*, plaintiffs, a class consisting of all undocumented school-age children of Mexican origin within a Texas school district, challenged Texas education laws that authorized school districts to refuse to admit undocumented school-age children.¹⁷⁵ The Court, in granting the students admittance into Texas schools, ruled that a denial of public education was a violation of the Equal Protection Clause.¹⁷⁶ The Court concluded that denying education affronts one of the goals of equal protection by causing “unreasonable obstacles” to individual advancement in society.¹⁷⁷ The rationale behind the Court’s opinion in *Plyler* extends to the right to comprehensive sex education. Just as denying students of Mexican origin a basic education placed unreasonable obstacles in the way of their individual advancement, denying the right to a basic, comprehensive sex education places unreasonable obstacles in the paths of students of all races, particularly those who suffer the harshest consequences for their lack of education—Black American youth.

According to the Court in *Plyler*:

The inestimable toll of that deprivation [of basic education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.¹⁷⁸

As in *Plyler*, abstinence-only education takes an “inestimable toll” on students’ well-beings, particularly those of African Americans, and most acutely on their physical welfare, but also on their intellectual, social, and psychological health. Those with AIDS undeniably face social stigma in our society, and social stigma, in turn, affects psychological welfare. Not only do AIDS and other STIs limit individual achievement, they can end it

See Matthew A. Brunell, *What Lawrence Brought for “Show and Tell”: The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343 (2005); Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993 (2001).

174. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

175. *Id.* at 206.

176. *Id.* at 230.

177. *Id.* at 222. The Court explained: “[i]lliteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.” *Id.*

178. *Id.*

altogether. Early pregnancy often limits both the mother's and her child's individual achievement as many teen mothers end up in poverty, often causing their children to suffer harsh consequences¹⁷⁹ and effectively preventing many youth, particularly minorities, from contributing to the progress of our nation. Thus, depriving individuals of basic sex education must be irreconcilable with the "framework of equality embodied in the Equal Protection Clause."¹⁸⁰ Intentionally deceiving students about the efficacy of contraception is a more egregious violation of the Equal Protection Clause.

The Court further noted in *Plyler* that the statute denying education to children of illegal immigrants imposes

lifetime hardship on a discrete class of children not accountable for their disabling status. . . . 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 [n]ation.¹⁸¹

Denying comprehensive sex education imposes a lifetime hardship analogous to that in *Plyler*. African American youth, like undocumented school-age children of Mexican origin, are not accountable for their status, as they cannot choose their race. Pervasive factors, particularly socioeconomic status and neighborhood characteristics,¹⁸² which Black youth cannot control, are significant indicators of their engagement in sexually risky behavior.¹⁸³ Like children of illegal immigrants, Black

179. See *supra* Part I.C; see also HOFFMAN, *supra* note 61, at 1, 13. Children of teen mothers aged seventeen and younger are much less likely to graduate high school, which adversely affects their earning potential. *Id.* at 14–15. Also, such children are more than two times as likely to be incarcerated. *Id.* at 16. If a young woman's mother had delayed her own first birth to age twenty or twenty-one, her daughter's risk of having a birth as a teen would fall by almost sixty percent, from one-third to just fourteen percent. *Id.* at 17–18.

180. *Plyler*, 457 U.S. at 222.

181. *Id.* at 223.

182. See John O. G. Billy et al., *Contextual Effects on the Sexual Behavior of Adolescent Women*, 56 J. MARRIAGE & FAM. 387 (1994); Christopher R. Browning et al., *Neighborhood Context and Racial Differences in Early Adolescent Sexual Activity*, 41 DEMOGRAPHY 697 (2004); Catherine Cubbin et al., *Neighborhood Context and Sexual Behaviors Among Adolescents: Findings from the National Longitudinal Study of Adolescent Health*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 125 (2005); Scott J. South & Eric P. Baumer, *Deciphering Community and Race Effects on Adolescent Premarital Childbearing*, 78 SOC. FORCES 1379 (2000).

183. See Browning et al., *supra* note 182, at 697 (finding that "demographic background, family processes, peer influences, and developmental risk factors account for about 30% of the baseline increased likelihood of early sexual onset" for Black youth compared to their White peers;

youth lack control over the circumstances of their lives, and denying children education, whether basic education or accurate information on sex, impairs each group's ability to succeed in society.

The Court's language—"by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority"¹⁸⁴—extends to the case for comprehensive sex education. Without accurate, comprehensive sex education, the opportunity for many teens, especially Black Americans, to raise their level of esteem is effectively foreclosed, as the lack of effective sex education programs contributes to the disproportionately high rates of HIV/AIDS, STDs, and pregnancy among African Americans, which, in turn, contribute to earlier deaths, decreased productivity, and poverty among Blacks.¹⁸⁵

More recently, the Ninth Circuit's holding in *Fields v. Palmdale School District*¹⁸⁶ lends support to the argument that comprehensive sex education is a necessary component of citizenship. In *Fields*, parents, upon discovering that a survey taken by their children included questions concerning sexual topics, argued that the questions violated their constitutional rights to control the upbringing of their children.¹⁸⁷ In reaching its holding that parents have no fundamental right to be their children's exclusive provider of information regarding sexual matters, the Ninth Circuit explained the importance of education in American society: "[E]ducation is not merely about teaching the basics of reading, writing, and arithmetic. Education serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds."¹⁸⁸ In order to give this language effect, a right to comprehensive sex education must be recognized both to protect children

nonetheless, significant racial differences remained and "[n]eighborhood-level concentrated poverty largely explained" the racial difference).

184. *Plyler*, 457 U.S. at 222. Although it is problematic to argue that Black Americans should have access to comprehensive sex education to make White Americans hold them in higher esteem, the Supreme Court used a similar argument to uphold affirmative action. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that a law school had a compelling interest in attaining a diverse study body because a diverse student body enhances the quality of all students' education). I use the quote to support the argument that Black Americans need adequate sex education in order to have an equal chance at succeeding in society.

185. See *supra* Part I.

186. 427 F.3d 1197 (9th Cir. 2005), *cert. denied*, 549 U.S. 1089 (2006).

187. *Id.* at 1200–03.

188. *Id.* at 1209.

from dangerous diseases and early pregnancy and to cultivate healthy and productive individuals from diverse backgrounds.

CONCLUSION

African Americans are disproportionately affected by sexually transmitted diseases, including HIV/AIDS, and teenage pregnancy. Despite their plight, the federal government has not only failed to address these problems but also acted contrary to correcting them. Funding for abstinence-only education programs has increased despite consistent showings that they do not delay sexual initiation, their primary objective. Conversely, comprehensive sex education, even without federal funding, is often effective at increasing contraceptive use and does not promote earlier initiation of sexual activity.

In order to allow youth, particularly African American youth, the opportunity to fully participate in American society, the Supreme Court must recognize a right to comprehensive sex education. The Court's reasoning in *Plyler v. Doe* provides the blueprint for recognizing students' rights to comprehensive sex education. Without comprehensive sex education, Black American youth face a debilitating disadvantage because of factors outside of their control. The Supreme Court has already held that such a condition violates the Equal Protection Clause, and now the holding needs only to be extended to comprehensive sex education.

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