

Abstinence-only Adolescent Education: Ineffective, Unpopular and Unconstitutional

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Abstinence-only, and abstinence-only until marriage education programs ostensibly designed to prevent unwanted pregnancy and sexually transmitted disease (STD) infection are a waste of valuable public health resources of both time and money. Federal funding to states for teaching abstinence-only and abstinence-only until marriage to adolescents has formerly been ruled constitutional in 1st amendment and due process challenges. When examining the expansion of these programs and their new restrictions in the light of recent scientific evidence revealing the ineffectiveness of these programs, it becomes clear that these programs fail to protect the health of this nation's youth. These programs' failure to accomplish their goals reduces their effect to promotion of furtherance of a particular religious viewpoint, in violation of the U.S.

Constitution. Furthermore, in the wake of the Supreme Court ruling in *Lawrence v. Texas*, the abstinence-only until marriage programs should also be scrutinized for their failure to address the rights of gay and lesbian adolescents. Not only are abstinence-only and abstinence-only until marriage programs ineffective for their intended purpose, they are dangerous, in that they fail to protect our nation's youth against serious and potentially deadly diseases. This article will address issues that are relevant to both abstinence-only and abstinence-only until marriage

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programs, referring to both under the more inclusive term “abstinence-only,” unless the discussion concerns only abstinence-only until marriage.

Although the federal government has no such duty, it funds educating adolescents to help them avoid pregnancy and sexually transmitted diseases. The federal government grants over 100 million dollars annually to states to promote abstinence-only education for teenage sexuality counseling.² The most recent of these programs, administered by the Department of Health and Human Services, goes beyond Congress’ directives in providing matching funds to states, by forbidding states from even using their own funds to teach anything other than abstinence sexual education in order to receive these funds.³ Separate federal funding for education to reduce the transmission of HIV disease requires that no federal money be spent in a way that “promotes” homosexual sex, and ostensibly any mention of such activity is considered promotion.⁴ Policies that intrude on educators’ ability to frankly discuss sex make it difficult to adequately prepare adolescents to protect themselves from unwanted pregnancy and STDs. The current administration is apparently not content with funding unproven methods, it now also chooses to thwart realistic efforts through these new funding mandates that seek to silence realistic sexual education. Organizations that provide educational outreach using frank and explicit language to gay and lesbian teens utilizing funds from non-federal sources have lately been the subject of harassing audits of their finances to ensure that federal money was not used in these more

² H.R. Comm. on Govt. Reform, *Politics and Science in the Bush Administration*, 108th Cong. 4 (Aug. 2003).

³ Under a block grant designated for mother and child health services, the Department of Health and Human Services funds. 42 U.S.C. § 701 (2003). “Special Programs of Regional and National Significance, Community Based Abstinence Education (“SPRANS CBAE”) offers funding for provision of **only** abstinence-only sex education. 68 FR 68632-03 (WL 22885319 F.R.) See Siecus.org for the effect of these programs on the education that this nation’s adolescents receive.

effective efforts.⁵ These audits squander the scant resources of these organizations so as to reduce their ability to operate. Unfortunately, the abstinence-only programs that are being funded are ineffective and interfere with proven efforts to decrease the rate of HIV and other STD transmission.

There is no scientific evidence that abstinence-only education is effective in deterring sexual behavior in adolescents.⁶ All of the credible studies performed to date have stressed the effectiveness and need for comprehensive sex education.⁷ Comprehensive programs teach abstinence, and are often called “abstinence plus,” because they also teach other strategies for avoiding unwanted pregnancies and STD infection. In spite of overwhelming evidence against the effectiveness of abstinence-only programs, Congress continues to defend and fund abstinence-only programs to the exclusion of the more effective programs. The majority of these abstinence-only programs are produced and run by religious organizations, a fact that spawned litigation when these programs were first introduced.⁸

Beginning with the Adolescent Family Life Act of 1981 (AFLA), funding for abstinence-only education has been given to states through federal matching grants.⁹ Later, through the 1996 Welfare Reform Legislation, Congress also provided funding to states that promoted its

⁴ 42 U.S.C § 300ee(c).

⁵ Christopher Healy, *No sex, please -- or we'll audit you*, http://archive.salon.com/mwt/feature/2003/10/28/abstinence/index_np.html (Oct. 28, 2003).

⁶ D. Kirby, *National Campaign to Prevent Teen Pregnancy, Emerging Answers: Research Findings on Programs to Reduce Teen Pregnancy*, http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf (May 2001).

⁷ *Id.*

⁸ I.e. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

⁹ Adolescent Family Life Act, 42 U.S.C. §§ 300z-300z10 (1981).

abstinence-only message to welfare recipients.¹⁰ Although the arguments for these statutes' constitutional compliance have always been tenuous, the unsurprising revelation that these programs are ineffective further erodes the past rationalizations used to justify their continuance.

The most recent program to fund abstinence-only education is Special Projects of Regional and National Significance – Community Based Abstinence Education (SPRANS-CBAE), which began funding programs in 2001, deriving its funding through a block grant designated for mother and child health services.¹¹ Grantees of these funds are expressly forbidden from using funds from outside the grant to provide "other education regarding sexual conduct" – including education regarding condom use to teenagers who are receiving abstinence-only education under this program. This requirement coerces states to abandon more comprehensive educational programs in order to qualify for this funding.

Although the incidence of teen pregnancy has actually decreased in the past decade, the rate of HIV infection has remained constant in young people and experts believe it will soon again be on the rise.¹² Especially at risk for HIV infection are males who have sex with other males ("MSM"). Abstinence-only until marriage education programs obviously hold little relevance

¹⁰ Pub. L. No. 104-193, § 912, 110 Stat. 2105 (1996).

¹¹ Chris Collins, et al. *Abstinence only vs. Comprehensive Sex Education: What are the Arguments, What is the Evidence?*, Aids Policy Research Center & Center for AIDS Prevention Studies, AIDS Research Institute, University of California San Francisco, 1, 6 (Mar. 2002).

¹² *Advancing HIV Prevention: New Strategies for a Changing Epidemic—United States, 2003*, 52 Morbidity & Mortality Wkly. Rpt. 329, 329-332 (Apr. 18, 2003).

for teens sexually attracted to members of their own sex. Currently unable to marry legally in this country, these programs advocate a life of celibacy for these individuals.^{12a}

Although it may be true that if every teen abstained from sex, teen pregnancy and the STDs would be eradicated among this group, teaching this simple truth with nothing more is hardly a novel approach.^{12b} Teen pregnancies have been considered problematic for centuries. Contrary to the beliefs of supporters of abstinence-only education, teaching safer sex, and education to prevent pregnancy by discussing contraception does not promote sexual activity in youth, it actually has been shown that it may have the opposite effect.¹³ The fact that this effect is not intuitive does not make it any less real. In the face of overwhelming evidence against the continued use of abstinence-only programs to teach our nation's youth, supporters of abstinence-only programs have maintained their insistence on further funding for these programs with arguments both myopic and cryptic, if not completely disingenuous. In spite of all the evidence against such programs, President Bush has recently proposed doubling the current funding for abstinence-only programs to \$270 million dollars for fiscal year 2005.¹⁴

When Congress passed the original statutes granting funds for teaching abstinence-only, there was not yet reliable data concerning the effectiveness of such programs. We now know that abstinence-only is not as effective as other approaches to reducing teen pregnancy and

^{12a} At the time of this writing, in defiance with state laws to the contrary, San Francisco and New Paltz, N.Y. have begun issuing marriage license to same sex couples as President George W. Bush advocates for a constitutional amendment prohibiting "gay marriage."

^{12b} Actually, many teens do not choose to have sex but contract diseases and become pregnant due to rape by adults and other teens.

¹³ Kirby, *supra* n. 6 at 88.

preventing the spread of STDs.¹⁵ Courts have previously held that abstinence only programs were constitutional, finding no violation of the Establishment Clause in funding them,¹⁶ as the morals promoted by these programs merely “coincided” with the morals of certain religions.¹⁷ As it is now known that an overwhelming majority of parents want their children to receive comprehensive sex education, it is difficult to understand exactly what secular morals are being promoted with these programs that are ineffective for their stated purpose.¹⁸ Beyond the ideological rhetoric, because unwanted teen pregnancies and transmission of sexually transmitted diseases are public health concerns, strictly moral considerations must take a back seat to protecting the health of this nation’s adolescents.

Further, these programs teach abstinence until *marriage* – although this is not always the best approach for young people in general, it is particularly cruel for lesbian and gay youth.^{18x}

Because there is as of yet, no possibility of marriage for gays and lesbians and Congress appears

¹⁴ Sexuality Information and Education Council of the United States (SIECUS), *President Proposes \$270 Million for Unproven Abstinence only-Until-Marriage Programs for FY 2005*, <http://www.siecus.org/media/press/press0049.html> (Feb. 2, 2004).

¹⁵ *HIV Prevention Efforts Reach a Crossroad as Signs Point to Rising Infections: Meanwhile, Politics is Deciding Prevention Strategy*, AIDS Alert (June 1, 2003)(available at 2003 WL 8735667), Jo Anne Grunbaum, Laura Kann, Steven A. Kinchen, Barbara Williams, James G. Ross, Richard Lowry & Lloyd Kolbe, Youth Risk Behavior Surveillance (YRBS) – United States, 2001, <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5104a1.htm> (June 28, 2002).

¹⁶ The Establishment Clause of the First Amendment provides, “Congress shall make no law respecting the establishment of religion.” U.S. Const. amend. I.

¹⁷ Specifically, Judeo-Christian morals, although as discussed *infra*, the issue is not limited to these. *Bowen*, 487 U.S. at 589.

¹⁸ Henry J. Kaiser Family Foundation, *Sex Education in America: A Series of National Surveys of Students, Parents, Teachers and Principals*, <http://www.kff.org> (last accessed Summer 2000).

^{18x} For brevity’s sake, this article will only refer to gays and lesbians, but is not meant to exclude others who may have sex with partners of the same sex, including, but not limited to bisexuals.

to be doing everything it can to prevent the future possibility of it,^{18b} these people are being told, in effect, to never have sex. The abstinence-only programs were developed before the groundbreaking case *Lawrence v. Texas*.¹⁹ Now that courts must recognize lesbian and gay people have a constitutional right to choose with whom they share intimate relationships, the rules that forbid funds to groups who provide comprehensive sex education, and make no provision for educating lesbians and gays run afoul of their constitutional rights.

There are a number of constitutional challenges that could be employed to force Congress to reexamine these ineffective programs: they violate the constitutional conditions doctrine by forbidding protected speech; they impermissibly further a religious viewpoint; and in light of *Lawrence v. Texas*,²⁰ striking down the nation's remaining sodomy laws, the nation's current policies now also violate the due process and equal protection rights of gay and lesbian adolescents. Each of these challenges will be discussed after a review of the history of abstinence-only education funding legislation and an exploration of some of the inconsistencies these laws inflict into the struggle to protect the health of this nation's adolescents.

II. Abstinence-only Education

Abstinence-only education at first glance may appear to be an intuitive approach to reducing teen pregnancies and incidence of STDs among adolescents. Teens who are not having sexual relations will obviously not get pregnant or infected with an STD. The federal laws funding

^{18b} Consider for instance, the not yet ripe issues involved in the Defense of Marriage Act ("DOMA"), and some congress members' calls for a constitutional amendment that would forbid "gay marriage."

¹⁹ 123 S. Ct. 2472 (2003).

many of these programs stress the importance of marriage, and “certainty” of avoiding infection by remaining abstinent. Teaching abstinence is not itself a problem, teaching abstinence-only education is the issue. Comprehensive sexual education programs, sometimes called “abstinence plus,” include abstinence as part of their message. These comprehensive approaches better protect the health of adolescents, because as evidenced by rates of teenage sexual activity, many teenagers are not abstinent.²¹ Almost half of all U.S. adolescents have had sexual relations before they graduated from high school.²² Around 900,000 teens between the ages of fifteen to nineteen become pregnant annually.²³ About four million cases of STDs occur annually among teens,²⁴ and one in four new cases of HIV infection happens to someone under twenty-two years old.²⁵ Comprehensive programs offering multiple strategies to avoid these dangers have been documented to be effective, but there have been no peer-reviewed studies that have shown any efficacy in abstinence-only programs for their stated purpose.²⁶ Although it must be admitted that if abstinence was indeed practiced, it would be 100% effective in reducing risk of STDs and

²⁰ *Id.*

²¹ Grunbaum, *supra* n. 16, “In 2001, 45.6% of high school students had ever had sexual intercourse; 42.1% of sexually active students had not used a condom at last sexual intercourse; and 2.3% had ever injected an illegal drug.”

²² *Id.*

²³ Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 *Hastings Const. L.Q.* 585, 585 (2000), citing Alan Guttmacher Inst., *Teenage Pregnancy: Overall Trends and State-by-State Information Summary*, tbl. 3 (1999).

²⁴ *Id.*, citing Henry J. Kaiser Family Found. & the American Social Health Ass'n, *Sexually Transmitted Diseases in America: How Many Cases and at What Cost?* 4, 8 (1998); *What Teens Don't Know About STDs Puts Them at Risk: A National Survey Finds Few Sexually Experienced 15-17 Year Olds Get Tested for STDs, And Most Underestimate Their Risk* (Henry J. Kaiser Family Found., MTV & Teen People) (press release dated Mar. 8, 1999).

²⁵ *Id.*

²⁶ *Id.*, citing P.S. Rosenberg, et al., *Declining Age at HIV Infection in the United States*, 330 *New Eng. J. Med.* 789 (1994); U.S. Dep't of Health & Human Services, *The Surgeon General's Call of Action to Promote Sexual Health and Responsible Sexual Behavior*, <http://www.surgeongeneral.gov/library/sexualhealth/call.htm> (accessed July 9, 2001).

avoiding teen pregnancy, despite centuries of attempts, teens are not always easily convinced to remain abstinent.

The abstinence-only approach is rooted in morals that courts have noted “coincide” with Judeo-Christian morals. Teaching children only about abstinence to protect themselves from unwanted pregnancy and STDs has been proven to be an unrealistic approach. Certainly even many religious adults are unable to practice abstinence.²⁷ There is no shortage of examples of the devout engaging in “immoral” sex; a recent example can be found in the recent discovery of many cases of sexual abuse of children by Catholic priests.²⁸

Although there is almost no scientific support for the efficacy of abstinence-only programs, the current Bush administration misleads the public about their impact, stating “abstinence has a proven track record of working.”²⁹ Supporters of abstinence-only programs often hold up Uganda’s successful program as a model in reducing the spread of HIV. Although the program teaches abstinence and stresses monogamy, it also advocates the use of condoms,³⁰ a practice the Bush administration is decidedly against. Although abstinence likely played a part in Uganda’s success, its role was likely minor compared to the more concerted use of condoms, which the Bush administration discourages.³¹ This administration notes that the pregnancy rate among

²⁷ Kirby, *supra* n. 6.

²⁸ Michael Paulson, *Abuse Study says 4% of Priests in US Accused*, http://www.boston.com/globe/spotlight/abuse/stories5/021704_study.htm (Feb. 17, 2004).

²⁹ U.S. Govt., *White House, Press Briefing by Ari Fleischer*, <http://www.whitehouse.gov/news/releases/2003/01/20030128-2.html> (Jan 27, 2003).

³⁰ “ABC,” Abstinence, Be faithful and Condoms.

³¹ “As an AIDS physician who has been involved in Uganda’s response to AIDS for twenty years, I fear that one small part of what led to Uganda’s success – promoting sexual abstinence – is being overemphasized in policy debates. While abstinence has played an important role in Uganda, it has not been a magic bullet.” David Serwadda, director of the Institute of Public

adolescents in the U.S. has been falling in the past decade, and attributes this effect to the advent of abstinence-only programs. Most scientific studies show it is more likely due to increased use of some form of birth control.

Under the Clinton administration, the department of Health and Human Services developed scientifically based outcome measures to track such programs' effectiveness.³² The Bush administration has replaced these measurable standards with alternative criteria that do not measure any actual outcome such as pregnancy or incidence of STDs, instead measuring *attendance* and *attitudes* of program participants at the end of the program.³³ A previous HHS funded report stressed measurements of behaviors, not attitudes are the hallmarks of good program evaluation.³⁴

Health at Makerere University in Uganda. Julian Meldrum, *Expert Panel Maps Global 'HIV Prevention Gap': \$6 Billion Needed by 2007*, <http://new.hst.org.za/news/index.php/20030523/> (accessed Dec. 2, 2003).

³² Global Health Council, *Uganda Leads by Example on AIDS*, <http://www.globalhealth.org/news/article2886> (Mar. 13, 2003). 65 Fed. Reg. 69562, 69562-69565 (Nov. 17, 2000).

³³ These new measures include: the proportion of program participants who successfully complete or remain enrolled in an abstinence only education program; the proportion of adolescents who understand that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy and sexually transmitted disease; the proportion of adolescents who indicate understanding of the social, psychological, and health gains to be realized by abstaining from premarital sexual activity; the proportion of participants who report they have refusal or assertiveness skills necessary to resist sexual urges and advances; the proportion of youth who commit to abstain from sexual activity until marriage; the proportion of participants who intend to avoid situations and risk, such as drug use and alcohol consumption, which make them more vulnerable to sexual advances and urges. U.S. Department of Health and Human Services, *SPRANS Community Based Abstinence Education Program, Pre Application Workshop* <http://www.teenpregnancy.org/resources/reading/getorgan.asp> (accessed Dec. 2002).

³⁴ National Campaign to Prevent Teen Pregnancy, *Get Organized: A Guide to Preventing Teen Pregnancy*, <http://www.teenpregnancy.org/resources/reading/getorgan.asp> (last updated Sept. 1999).

There has been little scientific evaluation of any abstinence-only program. Proponents of these programs cite to the scant support available, including an article in the *Portland Oregonian*,³⁵ a doctoral dissertation³⁶ and a report from the Michigan Department of Community Health.³⁷ There are few rigorous peer reviewed scientific articles on the efficacy of abstinence-only programs. One study evaluating programs taught by adults and peers in California found no measurable impact on the teenagers' sexual activities.³⁸ The study found that it was not likely an effect of the programs, however those who were taught by peers in abstinence-only programs were actually found to be more likely to report becoming pregnant or causing a pregnancy.³⁹

Another study that is often touted as “proving” abstinence-only works features a program that appears to show promise by revealing a lower incidence of sexual activity among students who take a virginity pledge.⁴⁰ The study also shows, however, the effect only occurs when small groups of students take the pledge. These students feel they are part of a special group who are superior to all the other teens not making such a pledge. The goal of making all teens take such a pledge would render this potential positive effect of this program useless. As the effect fails in large groups, forcing everyone to take the same pledge renders ineffective any positive attribute that a pledge might have had.

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³⁶ J.G. Mercer, *Defining and Teaching Abstinence: An E-mail Survey of Health Educations*, (unpublished thesis, N.C. St. U. 1999).

³⁷ Collins, et al. *supra* n. 11 at 8.

³⁸ See e.g. Douglas Kirby et al., *The Impact of Postponing Sexual Involvement Curriculum among Youths in California*, 29 Fam. Plan. Persp. 100, 100-108, <http://www.guttmacher.org/pubs/journals/2910097.html> (May/June 1997).

³⁹ *Id.*

⁴⁰ P. Bearman & H. Bruckner, *Promising the Future: Virginity Pledges and First Intercourse*, 106 Am. J. Sociology, 859, 859-912 (2001).

Important to this discussion is the fact that no one program is suitable for every location, or group of teens or every individual teen.⁴¹ Programs that are comprehensive must also be sensitive to the community they serve, as there are differences in teen attitudes, beliefs and behaviors based on their location, as well as on their ethnic and cultural heritage.^{41a}

Failing to acknowledge abstinence-only programs shortcomings is problematic; the more troubling aspect of the recent administrations' efforts to push abstinence-only programs is that federal agencies are apparently actively distorting scientific evidence to suit the administration's ideological goals. On its website, the Centers for Disease Control (CDC) previously made available a review of sex education programs that were found to be effective, based on scientific evaluation.⁴² Called "Programs That Work" (PTW), the site identified five comprehensive sex education programs, but no abstinence-only programs.⁴³ Visitors to the website now receive a message: "Thank you for your interest in Programs That Work (PTW). The CDC has discontinued PTW and is considering a new process that is more responsive to the changing needs and concerns of state and local education and health agencies and community

⁴¹ 3/1/03 AIDSALERT 33,. *HIV Prevention Summit Seeks New Strategies; Changes in Evaluation, Reimbursement Discussed*, AIDS Alert, (Mar. 1, 2003)(available at 2003 WL 8735648.

^{41a} S.L. Ferguson, Nurses' Role in the Prevention of Teen Pregnancy. *Journal of Pediatric Nursing* Jun 1997, 12 (3) p186-7 D'Souza C M; Shrier L A, *Prevention and Intervention of Sexually Transmitted Diseases in Adolescents*, Current Opinion in Pediatrics (Journal Code: 9000850)Department of Adolescent/Young Adult Medicine, Children's Hospital, Boston, Massachusetts 02115, USA.

⁴² U.S. Govt., CDC, *Programs That Work*, <http://www.cdc.gov/nccdphp/dash/rte/index.htm> (last updated Nov. 22, 2002).

⁴³ *Id.*

organizations.”⁴⁴ Apparently there are no programs that work that meet the current administrations “changing needs.”

None of this information concerning the inefficacy of abstinence-only programs is new. Scientists and sex educators have for the better part of this decade warned of the ineffectiveness of abstinence-only programs. The outcry against these programs is not new, but these voices have been largely ignored. In 2001, recognizing abstinence-only’s ineffectiveness, the venerable Institute of Medicine issued its report, “No Time to Lose,” recommending eliminating federal state and local “requirements that public funds be used for abstinence-only education, and that states and school districts implement and continue to support age appropriate comprehensive sex education and condom availability in schools.”⁴⁵

Promoting a strictly “moral-based” effort in lieu of a concerted scientific public health approach to this problem further complicates an already difficult issue. Abstinence-only proponents are so opposed to recognizing that teenagers are inherently sexual beings, that they exacerbate an already confusing topic by introducing additional ambiguity. Although abstinence-only programs teach adolescents not to have sex, it is unclear from many of their curricula what exactly is considered sex or even abstinence in these programs. Teens, as well as the public in general have far differing views as to what the words sex⁴⁶ or abstinence⁴⁷ mean. Abstinence-

⁴⁴ U.S. Govt., *CDC, Programs That Work*, <http://www.cdc.gov/nccphp/dash/rtc/> (accessed Feb. 6, 2004).

⁴⁵ M.S. Ruiz, *No Time to Lose: Getting More From HIV Prevention*, <http://books.nap.edu/books/0309071372/html/index.html> (last updated 2003).

⁴⁶ It was a source of much entertainment for the American public to learn in 1998 that their president did not consider oral sex to be sex. It turned out that many other Americans shared his definition of sex. In a Gallup poll taken at that time, 20% of the adults surveyed answered that oral sex was not a “sexual activity.” Gallup short subjects, 45) Gallup short subjects, *The Gallup*

only graduates may be engaging in behaviors that they may not consider sex, but may expose them to STDs.⁴⁸ By not engaging in vaginal intercourse, but instead experiencing anal intercourse and oral sex, many adolescents and adults believe they are practicing abstinence.⁴⁹ Although they might not be exposing themselves to causing or enduring an unwanted pregnancy, many of these sexual activities hold high risk for transmission of STDs, including HIV.^{49b} Unfortunately there is little recent rigorous scientific research in this area, likely due to the lack of federal funding available to research such issues.⁵⁰ Although some programs do provide

Poll Monthly, No. 396, Survey GP 9809035, Q. 15, 47, Sept. 21, 1998.. In one more recent study, adolescents 12-17 reported that 31 percent of females and 44 percent of males “strongly agree” or “somewhat agree” that oral sex is not as big a deal as sexual intercourse. *SexSmarts: Relationships*, October, 2002.

⁴⁷ In a 1994-95 study of college freshman, 61% believed mutual masturbation to be abstinent behavior, 37% believed the same of oral sex as did 24% about anal intercourse. P.F. Horan et al., *The meaning of Abstinence for College Students*, *Journal of HIV/AIDS Prevention & Education for Adolescents & Children*, 1998 2(2);51-66.

⁴⁸ Not just the victims of abstinence only education, but the general public is largely ignorant about the most common STD, which may be transmitted through intimate contact that might not be considered sex by a majority of people. Human papilloma virus (HPV) is thought to infect about 75% of the reproductive age U.S. population. CDC, *Genital HPV Infection* <http://www.cdc.gov/nchstp/dstd/dstdp.html> (May 2001).

⁴⁹ Lisa Remez, Alan Guttmacher Institute, *Oral Sex Among Adolescents: Is It Sex or Is It Abstinence?*, <http://www.agi-usa.org/pubs/journals/3229800.html> (Dec. 2000). Even health educators are apparently confused. In an email survey of 72 health educators, 30% responded that oral sex was abstinent behavior, and 29% replied that mutual masturbation was not. *Id.*, citing J.G. Mercer, *Defining and Teaching Abstinence: An E-mail Survey of Health Educators*, (unpublished thesis, N.C. St. U. 1999).

^{49b} In one study, about one third of adolescents identified themselves as virgins in spite of the fact that they engaged in oral sex, while one percent of these self identified “virgins” had engaged in anal sex. M.A. Schuster, et al., *The Sexual Practices of Adolescent Virgins: Genital Sexual Activities of High School Students who Never Had Vaginal Intercourse*, 86 *Am. J. Public Health* 1570, 1575 (1996).

⁵⁰ Debate in 1992 over federal funding for comprehensive sexuality studies is considered to have a chilling effect on researches in this area of study. D. DiMauro, *Sexuality Research in the United States: An Assessment of the Social and Behavioral Sciences*, New York: Social Science Research Council 1995. The concern about ideology driving decisions of science is hardly new, the conservatives labeled such studies as “reprehensible sex surveys” whose purpose was to “legitimize homosexuality and other sexually promiscuous lifestyles.” U.S. Govt., *Congressional Record, Senate, S4737*, <http://thomas.loc.gov/cgi-bin/query/F?r102:1:/temp/~r102SeXBzn:e257930>: (April 2, 1992).

definitions, the many abstinence-only programs as administered do not agree on how to define sex, or abstinence.⁵¹

In spite of a court's direction in a settlement agreement, discussed *infra*, that all information in abstinence-only programs should be medically accurate, many abstinence-only programs rely heavily on scare tactics and incomplete or misleading information.⁵² For example, a study is often cited as showing that thirty percent of sexually active teens contract an STD, including those who used condoms for protection.⁵³ The study cited actually focused on contraception, but also measured incidence of "new" STD infection. Some of the participants came to the study having already been infected at least once with an STD.⁵⁴ More out of context is the distortion on the use of condoms in the study. Although participants who chose condoms for their method of contraception had similar rates of new infection for STDs as other types of contraception, the study also noted participants used condoms only about fifty percent of the times they had sexual relations.⁵⁵ Promoters of abstinence-only relying upon this study also neglect to mention that the experts reporting this study ultimately recommended some barrier method, such as condoms, for sexually active adolescents using implants or oral contraceptives.⁵⁶

⁵¹ Mercer, *supra*, n. 49.

⁵² See *Responsible Sexual Choices and You: Let's Talk About Safe Sex*, <http://www.epigee.org/guide/sexuality.html> (last updated Jan. 7, 2003) citing L.M. Dinerman, et al. *Outcomes of Adolescents Using Levonorgestrel Implants vs. Oral Contraceptives or Other Contraceptive Methods*, 149 *Archives of Pediatric & Adolescent Med.* No. 9 (Sept. 1995).

⁵³ The results are worded in such a way that the reader is led to believe that 30% of condom users got infected with and STD. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Particularly disturbing is the Bush administration's misinformation regarding condoms. Condoms are still considered one of the most effective means of helping to prevent HIV and other STD transmission.⁵⁷ The CDC's website formerly posted a comprehensive fact sheet about condoms, including information on selection, use and effectiveness of condoms.⁵⁸ This site also cited studies showing that condom education does not promote sexual activity, noting that "a World Health Organization review . . . found no evidence that sex education leads to earlier or increased sexual activity in young people."⁵⁹ This web information has been replaced with a page that emphasizes condom failure rates, provides no instruction on condom use, but does discuss the benefits of abstinence.⁶⁰ Condoms can play an important role in preventing unwanted teen pregnancies, and also in the prevention of STDs, including HIV. Efforts to stop the spread of HIV are likely hampered by the effects of abstinence-only federal funding that renders many adolescents unable to protect themselves when many of them eventually do have sex by not knowing the facts concerning condoms, nor of their proper use.^{61a}

III. The Impact of Abstinence-only Programs on HIV/STD Prevention Education

⁵⁷ H.R. Comm. on Govt. Reform, *supra* n. 2, citing to WHO information as well as former CDC web materials available at: www.house.gov/reform/min/pdfs/pdf_inves/pdf_admin_hhs_info_condoms_fact_sheet_orig.pdf.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* Not just in the sphere of educating this nation's youth, the Bush administration has made similar changes in the web site for the State Department's Agency for International Development (USAID). As late as February 2003, the pages stated that condoms are "highly effective for preventing HIV transmission," and were the "cornerstone of USAID's HIV prevention strategy." This page is no longer available; more recent web pages replacing it are less sanguine about the effectiveness of condoms.

^{61a} Although condoms do sometimes fail, the rate of failure is rather small, especially when a condom is used properly. Many abstinence only programs distort the failure rates, or offer information that condoms are exceptionally difficult to use.

While the Bush administration has increased funding for ineffective abstinence-only programs, there has been a net decrease in the budget for domestic HIV prevention programs.⁶¹ For many years, the rate of incidence of HIV infection in the United States held constant, or was diminishing.⁶² However, recent advances in retroviral therapies and other pharmaceuticals to fight opportunistic infections have decreased the public's fear of HIV infection. The public is less likely to see the progression of HIV to what used to be referred to as "full blown AIDS," characterized by emaciated victims, or by the purplish skin lesions brought on by Kaposi's sarcoma. The confidence brought on by the advancement of HIV treatment is also believed to have given the public a sense of false security in medicine's ability to treat HIV disease, causing many people to abandon safer sex practices.⁶³

Although teen pregnancy has leveled off in the past decade, the rates of STDs and HIV infection among people under the age of 25 are on the rise.⁶⁴ Of the approximate 40,000 new HIV infections that will be reported in the U.S. this year, half will occur in people who are under 25 years old. About 10,000 of these diagnoses will be for people under 22 years of age. Because of the lack of symptoms during its latency period, many of these young people were likely infected as teens. All young people are not at the same level of risk. Males who have sex with males,

⁶¹ SIECUS, *States' Increasing Budget Deficits, Expenditures on Small Pox Vaccinations Lead to Cuts in HIV Prevention and Other Public Health Services*, <http://www.siecus.org/policy/Pudates/pdate0052.html> (Mar. 2003); SIECUS, *Abstinence-Only Earmarks Signify New Federal Funding Agenda*, <http://www.siecus.org/policy/Pudate/pdate0054.html> (Apr. 2003).

⁶² U.S. Govt., *Cases of HIV infection and AIDS in the United States, 2002; HIV/AIDS Surveillance Report, Vol.14*, <http://www.cdc.gov/hiv/stats/hasr1402.htm> (last updated Nov. 19, 2003).

⁶³ U.S. Govt., *Youth Risk Behavior Surveillance – United States, 1999*, <http://www.cdc.gov/mmwr/PDF/SS/SS4905.pdf> (June 9, 2000).

⁶⁴ *Id.* The study also noted that a majority of these sexually active teens used condoms, and over 20% of the females reported using birth control pills.

bisexuals, transgender people, runaways, injection drug users, victims of sexual abuse, children in foster care and incarcerated youth all have elevated levels of risk.^{64a} Gay adolescents are obviously not being adequately educated to protect themselves with abstinence-only programs. Although it would be difficult to determine the cause for recent rises in HIV infection in Texas in areas where only abstinence-only is taught, HIV infection rates have been documented to have increased there since HIV case information has been collected in 1999.⁶⁵

In many U.S. cities, the incidence of syphilis and gonorrhea has been on the rise, particularly among males who have sex with males (MSM).⁶⁶ Many scientists are concerned that this effect is evidence of an increased level of activity that would also put these people at risk for HIV infection, and predict future increased rates of HIV infection, especially among MSM.⁶⁷

Nationwide, the rate of HIV infection remained fairly stable even among MSM in the early 1990's.⁶⁸ However, during 1999-2001, HIV infection among MSM rose 14%, and rose 10% among heterosexuals.⁶⁹ In spring 2001, the CDC optimistically announced that in the following year, the incidence of new HIV infections would be reduced by 6%, and by 2005, the incidence would be reduced by 50%.⁷⁰ Although it is impossible to pinpoint a cause for the turnaround,

^{64a} *HIV Prevention Efforts Reach a Crossroad as Signs Point to Rising Infections: Meanwhile, Politics is Deciding Prevention Strategy*, AIDS Alert (June 1, 2003)(available at 2003 WL 8735667).

⁶⁵ *Supra*, n. 16.

⁶⁶ *Supra*, n. 12.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ These increases are in the 25 states that had mandatory HIV reporting since 1994. P. Fleming et al., *HIV Prevalence in the United States, 2000* [Abstract]. In Program and abstracts of the 9th Conference on retrovirus and Opportunistic Infections, Seattle Washington, February 24-28, 2002, Alexandria, Virginia: Foundation for Retrovirology and Human Health, (cited in CDC, *Advancing HIV Prevention: New Strategies for a Changing Epidemic – United States*, 52 Morbidity & Mortality Wkly. Rpt. (Apr. 18, 2003).

⁷⁰ *Supra*, n. 16.

now there is no evidence to show that the rates will be dropping at all.⁷¹ In fact, the new predictions are for increased incidence of new HIV infection. Whether or not this is the effect of failing to teach adolescents about safer sex techniques is unclear. What is clear is that federal spending to reduce the spread of HIV is being wasted if conflicting federally funded programs stressing abstinence-only leave millions of teenagers unprepared to adequately protect themselves from HIV infection.

The CDC recently unveiled a new strategy to more efficiently control the spread of HIV transmission.⁷² One effort in this strategy will be increasing testing to identify people who are HIV infected.⁷³ Because many HIV infected people do not get tested until long after their infection, they may be spreading this infection unwittingly. The time when HIV remains dormant in an infected person's body, the time between a person's infection and their manifesting one of the AIDS diagnoses, may be as long as ten years.⁷⁴ Many HIV infected people do not consider getting tested until they become ill with an opportunistic infection.⁷⁵ While these people are positive and asymptomatic, they may be spreading HIV infection to

⁷¹ *Id.*

⁷² *Supra*, n. 12.

⁷³ U.S. Govt., *Primary and Secondary Syphilis Among Men Who have Sex with Men, - New York City, 2001*, 51 *Morbidity & Mortality Wkly. Rpt.*, 853, 853-856 (2002); U.S. Govt., *Resurgent Bacterial Sexually Transmitted Disease Among Men Who Have Sex With Men – King County, Washington, 1997-1999*, 48 *Morbidity & Mortality Wkly. Rpt.*, 773 (1999); C. Cielecki, H. Beidinger, *Emergence of Primary and Secondary Syphilis Among Men Who have Sex With Men in Chicago and Relationship to HIV Infection*. In Program and abstracts of the 7th Conference on Retroviruses and Opportunistic infections; Chicago Illinois; January 30- February 2, 2000, Abstract 470 (cited in *Advancing HIV Prevention: The Science Behind the New Initiative*, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5215a1.htm> (Apr. 18, 2003)).

⁷⁴ *Supra*, n. 12.

⁷⁵ DA MacKellar, et al., *Unrecognized HIV Infection, Risk Behaviors, and Mis-perceptions of Risk Among Young Men Who Have Sex With Men – 6 United States Cities, 1994-2000*. [Abstract] In final program and abstracts of the XIV International AIDS Conference, Barcelona Spain, July

others. Testing will help to identify these people earlier. Early diagnosis is hoped will lead to less infection, as people who are diagnosed HIV positive are far more likely to practice safer sex or abstinence after learning of their infection.⁷⁶ The CDC projects between 180,000 to 280,000 U.S. Citizens are unknowingly infected with HIV.⁷⁷

Because up to half of the people being diagnosed annually as infected with HIV in this country are under 25 years of age, many of them are likely to have contracted the disease in their teens. Knowing this, and of the failure of abstinence-only to stop almost half of this nation's teens from engaging in sexual behavior^{77a} which puts them at risk for HIV behavior, failing to properly educate children on ways to protect themselves against infection with a still deadly disease is unconscionable. Studies of teenage sexual activity reveal that about forty-eight percent of teens are sexually active.⁷⁸ In spite of claims that teaching adolescents about sex encourages them to engage in sexual practices, all scientific studies show that there is no effect, or in some cases, actually a delay in the onset of sexual activity when a teen has received comprehensive sexual education.⁷⁹

5-12, 2002 (cited in *Advancing HIV Prevention: The Science Behind the New Initiative*, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5215a1.htm> (Apr. 18, 2003).

⁷⁶ U.S. Govt., *Adoption of Protective Behaviors Among Persons with Recent HIV Infection and Diagnosis – Alabama, New Jersey and Tennessee, 1997-98*, 49 *Morbidity & Mortality Wkly. Rpt.*, 512, 512-515 (June 16, 2000).

⁷⁷ This is about 25% of all people living with HIV in the U.S. P. Fleming et al., *HIV Prevalence in the United States, 2000* [Abstract], *supra*, n. 71.

^{77a} This is not even taking into account the adolescents who engage in sexual activity which puts them at risk for STDs, such as oral and anal sex, yet do not consider themselves to be having sex, discussed *x*.

⁷⁸ Kasier Family Foundation, *Fact Sheet – Teen Sexual Activity*, <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13521> (last updated Jan. 29, 2003).

⁷⁹ Kirby, *supra*, n. 6.

One difficulty with this new CDC strategy is getting young people tested for infection with HIV. Even sexually active teens are unlikely to get tested for HIV infection.⁸⁰ Only about one-fourth of sexually active fifteen to seventeen-year-old sexually experienced teens report ever having been tested for HIV.⁸¹ The CDC's new approach to testing will apportion more resources on ensuring people infected with HIV are identified and counseled to reduce their engaging in high risk behaviors.⁸² The CDC will expand programs to help people learn their HIV status, and expand their prevention programs specifically for people with HIV. The recent development of a quicker, easier to read test may also aid in this effort.⁸³ Previously, there was a week or more delay from the time of testing to the presentation of the results.⁸⁴ Many people who are tested fail to return for the results.⁸⁵ On the spot results could ensure that more infected people learn of their status. The CDC is also offering grants for training clinic workers to administer and interpret the tests.⁸⁶ Immediately following the tests, infected persons can be identified. Presumably, this will lead to increased adherence to safer sex practices and an eventual lowering of the HIV incidence rate.

HIV/AIDS prevention education has been funded by the CDC since 1988.⁸⁷ In 2000, the CDC budgeted \$47 million for in school HIV education. These funds were to be directed "toward

⁸⁰ U.S. Govt., *CDC's New HIV Initiative- Advancing HIV Prevention: New Strategies for a Changing Epidemic – United States*, <http://www.cdc.gov/hiv/partners/question.htm> (last updated Oct. 14, 2003).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ CL Richards & D. Daley, *Politics and Policy: Driving Forces Behind Sexuality Education in the United States*, in Drolet & Clark eds. *The Sexuality Education Challenge, Promoting Healthy Sexuality in Young People*, ETR Associates (1994).

strengthening national efforts for coordinated school health education.”⁸⁸ The funding is shared by forty-eight states and the District of Columbia.⁸⁹ The schools receiving this funding must have their curriculum reviewed, following Guidelines for Effective School Health Education to Prevent the Spread of AIDS, which recommends a comprehensive education to protect the students.⁹⁰

The deputy director of the National Center for HIV, STD and TB Prevention at the Centers for Disease Control, Ronald Valdiserri, has counseled clinicians that the most effective interventions promote personal intervention skills and promote change in sexual and drug use behavior, including increasing condom use.⁹¹ None of his recommendations include teaching abstinence-only. In spite of the experts’ advice, in 2002 the federal government provided more than 100 million dollars for abstinence-only programs, and another 50 million of CDC funding for HIV/STD prevention funding which was earmarked for abstinence-only programs.⁹²

Social conservatives also wanted to insert language into a House bill that would make abstinence a priority in HIV/AIDS prevention,⁹³ in spite of the fact that abstinence-only adolescent sexuality education conflicts with effective HIV prevention education. This conflict is most unreasonable

⁸⁸ Henry J. Kaiser Family Foundation, *Issue Update, October 2002*, <http://www.kff.org> (citing Centers for Disease Control and Prevention, *School Health Programs: An Investment in our Nation’s Future. At a Glance* (1999).

⁸⁹ *Id.*, Ohio and Utah are the only states that do not accept this funding.

⁹⁰ *Centers for Disease Control and Prevention, Guidelines for Effective School Health Education to Prevent the Spread of AIDS*, 37 *Morbidity & Mortality Wkly. Rpt. (S-2)*, 1, 1-14 (Jan. 29, 1988).

⁹¹ *Supra*, n. 16.

⁹² *Id.*

⁹³ Heather Boonstra, senior policy associate for the Alan Guttmacher Institute, cited in 6/1/03 *AIDS Alert* (available at 2003 WL 8735667).

under SPRANS-CBAE, which forbids recipients from teaching anything other than abstinence in their programs.⁹⁴

Through its abandonment of frank and scientifically proven methods of protecting adolescents from unintended pregnancy and STDs, and by embracing abstinence-only programs, the current administration not only squanders taxpayer funds, but interferes with public health efforts to reduce the incidence of STDs, including HIV/AIDS.

IV. Constitutional Limitations of Federal Funding For Abstinence-Only Education

Of the three federal programs to fund abstinence-only education, two are concerned specifically with educating school-aged children: AFLA and SPRANS-CBAE.⁹⁵ Similarly constitutionally problematic and ineffective in stemming the spread of STDs and in curbing unwanted pregnancy is the 1996 Welfare Reform Legislation.⁹⁶ There are similar public health issues involved and constitutional problems with the welfare “reform” legislation that are fully discussed in a number of excellent articles, but will not be addressed in this article.⁹⁷ AFLA has been previously ruled not to violate the Constitution “on its face,”⁹⁸ but with recent Supreme Court cases and the wealth of information concerning the efficacy of abstinence-only programs, it should not survive further constitutional challenge. Even more troubling than AFLA is the more recent SPRANS-CBAE program, which will be discussed following a review of AFLA.

⁹⁴ 68 FR 68632-03 (WL 22885319 F.R.).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ For an in depth discussion and constitutional analysis of this program, *see* Julie Jones, Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence Only Until Marriage Sexuality Education, 35 Creighton L. Rev. 1075 (2002).

A. The Adolescent Family Life Act

Congress enacted the Adolescent Family Life Act (AFLA)⁹⁹ in 1981 in response to the “severe adverse health, social, and economic consequences” caused by pregnancy and childbirth to unmarried teenagers.¹⁰⁰ These grants were developed to fund public or non-profit private organizations “for services and research in the area of premarital adolescent sexual relations and pregnancy.”¹⁰¹ These grants had several purposes, including promoting “self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations.” The necessary services that were funded included “educational services relating to family life and problems associated with premarital sexual relations.”¹⁰²

AFLA expressly requires the promotion of family support and involvement of religious and charitable organizations and voluntary organizations.¹⁰³ AFLA expressly forbids funds from

⁹⁸ *Bowen*, 487 U.S. at 602.

⁹⁹ Pub. L. 97-35, 95 Stat 578, 42 U.S.C. § 300z et seq., (1982 ed. and Supp. IV).

¹⁰⁰ *Bowen*, 487 U.S. at 593 (quoting 42 U.S.C. Sec. 300z(a)(5) (918 2ed., Supp. IV).

¹⁰¹ *Id.* (quoting S. Rep. No. 97-161 p, 1 (1981).

¹⁰² 42 U.S.C. § 300z(a)(4) provides in relevant part: “(4) 'necessary services' means services which may be provided by grantees which are--

(E) referral for screening and treatment of venereal disease;

(G) educational services relating to family life and problems associated with adolescent premarital sexual relations, including--

(ii) education on the responsibilities of sexuality and parenting;

(iv) assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(O) outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

(Q) such other services consistent with the purposes of this subchapter as the Secretary may approve in accordance with regulations promulgated by the Secretary.”

¹⁰³ *Id.* at § 300z(a)(10)(C).

being used to fund, promote or encourage abortion.¹⁰⁴ A constitutional challenge to AFLA was successful in the District Court for the District of Columbia, which ruled that AFLA had the primary effect of advancing religion.¹⁰⁵ The Supreme Court overruled the District Court’s ruling and held that AFLA was facially constitutional, and remanded with instructions to consider whether the individual grants to the various organizations would have the primary effect of advancing religion.¹⁰⁶ The Court found no conflict in the desired effects of the legislation advancing certain morals “coinciding” with the religious groups’ morals. Further litigation was pursued¹⁰⁷ resulting in a settlement agreement providing that AFLA funded programs may not be used at sites used for religious worship and that all the information must be medically accurate.¹⁰⁸

At the time of these constitutional challenges, abstinence-only programs had not been evaluated to consider their effectiveness. In his opinion, Rehnquist noted that it was Congress’ judgment that religious organizations could help the problem that AFLA sought to ameliorate.¹⁰⁹ He pointed out that “Congress found, ‘prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties,’ Sec. 300z(a)(10)(A).”¹¹⁰ This “finding” has been proven to be completely without merit as no

¹⁰⁴ *Id.* at §§ 300z-3(b)(1), 300z-10(a).

¹⁰⁵ *Kendrick v. Bowen*, 657 F. Supp. 1547, 1560 (D.C. 1987) (overruled 487 U.S. 589).

¹⁰⁶ *Bowen*, 487 U.S. at 622.

¹⁰⁷ *Kendrick v. Bowen*, 703 F. Supp. 1 (D.C. 1989).

¹⁰⁸ See Jones, *supra* n. 90 at 1080-81, citing D. Daley, *Exclusive Purpose: Abstinence-Only Proponents Create Federal Entitlement in Welfare Reform*, <http://www.siecus.org/siecusreport/volume25/25-4.pdf>. (Apr./May 1997); Settlement Reached in AFLA Lawsuit, Paving Way for Program Changes, Oversight, Wash. Memo The Alan Guttmacher Institute, *Settlement in AFLA Lawsuit, Paving Way for Program Changes, Oversight*, Wash. Memo, 3-4 (Feb. 9, 1993). Also change *supra* to n. 97.

¹⁰⁹ *Bowen*, 487 U.S. at 607.

¹¹⁰ *Id.*

scientific studies support abstinence-only as an effective method to protect teens from problems associated with sexual activity.¹¹¹ Although Rehnquist’s arguments in *Kendrick* were less than satisfying in ruling that AFLA was constitutional, by applying his same analysis today, it is obvious that AFLA no longer complies.

The Court employed the three prong Lemon¹¹² test to evaluate if AFLA violated the Establishment Clause, asking whether the statute in question was 1) motivated only by an impermissible purpose, 2) its primary effect was the advancement of religion, or 3) if it requires excessive entanglement of the church and state.¹¹³ Under the first prong, the Court found that the creation of AFLA was motivated by a secular purpose, to eliminate or reduce problems caused by teenage sexuality.¹¹⁴ The Court found no evidence that the actual purpose in enacting AFLA was to “endorse religion,” nor did the Court “doubt that Congress’ expressed purposes are ‘sincere and not a sham.’”¹¹⁵

The Court found the second prong of the Lemon, whether the statute had the primary effect of advancing religion test, to be more difficult. Because many religious groups were recipients of the funding for their role in educating teens under AFLA, the District Court below was far more skeptical of the primary effects than was the Supreme Court.¹¹⁶ The Court noted that AFLA expressly stated “the problems of teenage sexuality were best approached through a variety of integrated and essential services provided to adolescents and their families by [, among others]

¹¹¹ *Id.*

¹¹² *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

¹¹³ *Bowen*, 487 U.S. at 602.

¹¹⁴ *Id.* at 603.

¹¹⁵ *Id.* at 604.

¹¹⁶ *Kendrick*, 657 F. Supp. At 1557, *overruled* by 487 U.S. 589 (1988).

religious organizations.”¹¹⁷ Although this may have been thought to be accurate then, this is where the passage of time has changed the outcome of this application of the Lemon test. The stated purposes may have seemed rational at the time, but now that all scientific evidence points to the contrary, it is now incontrovertible that these approaches are no longer “the best way” to approach problems of teenage sexuality. Now, the only effect the act has is to further those morals that “coincide” with certain religious morals.

The Court held that any effect of advancing religion under AFLA was “at most ‘incidental and remote.’”¹¹⁸ The Court noted that the moral views advanced by AFLA were not necessarily religious in nature, but more accurately coincided with the moral views advanced in the legislation.¹¹⁹ With the current knowledge of the effectiveness of these programs, it is clear that the “primary effect” of the legislation has not been to do anything about teen sexuality, but is to impose a set of morals. This particular set of morals must be examined to determine if it is indeed advancing religion.

There are many differing moral views concerning sexual education of adolescents, but the moral views embraced in all of these abstinence programs appear only to decidedly further certain religious goals. Morals are certainly not always religious in nature. Communities may have a moral sense that is not rooted in religion. In the recently overruled *Bowers v. Hardwick*, the Supreme Court opined on the effect of majority’s morality on the law. “[The respondent] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of 25 states should be invalidated on that

¹¹⁷ *Bowen*, 487 U.S. at 606, citing to § 300z(a)(8)(B), (2).

¹¹⁸ *Id.* at 607, citing *Lynch*, 465 U.S. at 683.

basis.”¹²⁰ So in *Bowers*, the court considered the morals of the majority. Similarly, an epidemiologist describes community morals as what is thought to be correct or good by the great majority of competent persons.¹²¹ In fact, the majority of parents in the U.S. believe that adolescents should receive comprehensive sex education to prevent unwanted pregnancies and STDs.¹²² Assuming that most of these people are indeed competent, apparently the morals embraced by this group of people is one of concern for their children’s health, not a blind obeisance to a celibacy goal that is unrealistic for all adolescents. As the majority of parents in the U.S. believe that their children should receive comprehensive sexual education, the imposition of a certain moral set that is not shared by the majority is evidence of a furtherance of another set of morals and values. As AFLA has no other effect, its primary effect now must be viewed as the imposition of particular religious morals and the advancement of religion.

The third prong of the Lemon test concerning excessive entanglement of the church and state has not likely been affected by the passage of time. The Supreme Court disagreed with the District Courts’ conclusion that AFLA was an excessive entanglement between church and state. The Court found no violation of the Establishment Clause under AFLA “on its face,” but directed the district court to consider individual grants to see if they had the primary effect of advancing religion.¹²³ In any event, a violation of the second prong should be sufficient to find AFLA unconstitutional.

¹¹⁹ *Id.* at 612-13.

¹²⁰ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), overruled, 123 S. Ct., 2472 (2003).

¹²¹ Considering the issue is of great public health concern, a step outside of the legal only context seems rational. Phillip Cole, *The Moral basis for Public Health Interventions*, *Epidemiology* (January 1995) 78. See also Justice Thomas’ dissent in *Lawrence*, criticizing the majority for not recognizing a majoritarian view of morality.

¹²² Henry J. Kaiser Family Foundation, *supra* n. 16.

¹²³ *Bowen*, 487 U.S. at 621-622.

Some of the abstinence-only programs being run by religious organizations make little effort to hide their religious goals. Clue 2000's curriculum states that "religions vary, but every religious scripture has a clearly worded warning about the dangers of misusing sex," then supports this assertion with quotes from the New Testament, the Old Testament, the Dhammadpada, the Quran and the Bhagavad-Gita.^{123a} The curricular materials add their own legal analysis distinguishing that the above is "not an attempt to teach religion in school. It is an attempt to teach about religion, e.g. comparative religion, which was a recommendation made by the U.S. Supreme Court when they restricted prayer in the public school settings."^{123b} This is just one blatant example, but many abstinence-only programs rely on a "universal" moral code concerning sexual behavior, and although "many adults believe premarital sexual behavior is wrong or unwise, it is not a universally held belief."^{123c}

Previously, the Court had ruled that the morals being forwarded in AFLA just happened to coincide with a certain set of religious morals, and therefore did not violate the Establishment Clause. Now that it is apparent that the morals of the community in question do not coincide with abstinence-only programs morals, it is no longer possible to claim that these funds are not advancing a particular religion. AFLA would not now survive a Lemon analysis as applied in *Kendricks* and must be struck down as unconstitutional. Other abstinence-only legislation is even more seriously flawed and should also be struck down or repealed.

^{123a} Clue 2000, *Abstinence 'Til Marriage*, 3-4, cited in M.E. Kempner, *Toward a Sexually Healthy America*, SIECUS available at siecus.org.

^{123b} *Id.* At 3.

^{123c} M.E. Kempner, *Toward a Sexually Healthy America*, 16, SIECUS available at siecus.org.

B. Special Projects of Regional and National Significance, Community Based
Abstinence Education (SPRANS-CBAE)

Although all of the abstinence-only education funding programs should be dismantled due to their ineffectiveness and overt entanglement with religion, SPRANS-CBAE most clearly violates the unconstitutional conditions doctrine with its impermissible restrictions on speech. For all of the reasons articulated in the analysis above concerning AFLA, SPRANS-CBAE is unconstitutional; furthermore it violates the unconstitutional conditions doctrine. The funding for SPRANS-CBAE dwarfs the AFLA budget, and is “authorized” through a block grant made available to the Secretary of the Department of Health and Human Services.¹²⁴ Congress must restrict HHS funds from being used in this unconstitutional manner, and failing this, the courts must step in and strike down this program.

The doctrine of unconstitutional conditions forbids the government from granting benefits with a condition that its recipients forego a constitutional right.¹²⁵ Even when a person does not have a right to a government benefit, that benefit may not be denied upon the condition of infringing on their fundamental constitutional rights, including freedom of speech.¹²⁶ In *Sinderman*, the court ruled that if it were permissible to deny funding to persons based on their giving up a fundamental right, it could “produce a result which (it) could not command directly.”¹²⁷

SPRANS-CBAE abstinence-only funding programs run afoul of the unconstitutional conditions doctrine by forbidding protected speech as a condition for receipt of these funds.

¹²⁴ 42 U.S.C § 710(a)(2) provides for funds to enable the secretary to “Provide special projects of regional and national significance,” ostensibly for mother and child health services.

¹²⁵ Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989).

¹²⁶ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Prior to 1991, the unconstitutional conditions doctrine was clearer in application. In that year, however, the Supreme Court broke from established unconstitutional conditions doctrine in ruling that Health and Human Service regulations that prohibited Title X funding to family counseling organizations that discussed abortion as a lawful option did not violate the Constitution.¹²⁸ Litigants claimed that the statutes which made funding for reproductive services conditional on not discussing abortion deprived them of their first amendment right to free speech, to discuss a constitutionally protected activity.¹²⁹ The litigants were being denied the right to discuss a woman's right to an abortion as part of their federally funded reproductive counseling activities.

Rehnquist wrote that the program did not infringe on the litigants' free speech rights, as the petitioners were still free to discuss abortions on their own, outside the clinical setting that was funded with Title X dollars.¹³⁰ The regulations only prohibited them from counseling about abortion while engaged in the funded clinic's activities.¹³¹ Rehnquist went as far as to opine that talk about abortion in the context of providing these reproductive services was not even speech - it was an activity.¹³² He also noted the government has a right to selectively support certain activities it finds to be in the public interest to the exclusion of others.

¹²⁷ *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

¹²⁸ *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹²⁹ *Id.* at 181.

¹³⁰ *Id.* at 178.

¹³¹ "The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." 42 CFR § 59.9 (1989).

¹³² *Rust*, 500 U.S. at 193-194.

The AFLA abstinence-only programs do not prohibit schools or school districts from teaching other than abstinence-only, but the funds received under AFLA were to be used only to fund abstinence-only education. Because states could, and many did use alternative funds to teach comprehensive sex education, AFLA did not violate the constitutional conditions doctrine as applied in *Rust*. This is not the case with SPRANS-CBAE.

Although *Rust* limited the scope of unconstitutional conditions challenges, in *Planned Parenthood of Central Texas v. Sanchez*,¹³³ the court distinguished the effect of *Rust* from a constitutional challenge of an unconstitutional condition imposed by a rider to a Texas statute¹³⁴ that forbids disbursement of family planning funds to groups that performed abortions, even if the abortions were paid for solely from private funds.¹³⁵ Because the rider was found to withhold funding from a recipient based on their engaging in a constitutionally protected activity, the rider was ruled to be an unconstitutional condition on the receipt of the government funds. This is distinct from *Rust* where no unconstitutional condition was found because the Court ruled that the recipient of Title X funds in that case could always engage in abortion related activity outside of the scope of the activity funded by Title X.¹³⁶ No educator has such an opportunity under SPRANS-CBAE. Educators cannot call together groups of students to discuss sex outside of the sanctioned school activities without risking the loss of their jobs or looking like sexual predators.

¹³³ 280 F. Supp. 2d 590, 593(W.D. Tex . 2003).

¹³⁴ Rider 8 to the Texas General Appropriations Act. June 2, 2003, signed by Governor Rick Perry on June 22, 2003. Tex. H. 1, 78th Leg., June 8, 2003.

¹³⁵ *Planned Parenthood*, 280 F. Supp. 2d at 593.

Sanchez distinguished the refusal to fund an entity because of protected activities that it may engage in using non Title X funds. The Court observed that although a refusal to fund abortions does not run afoul of the unconstitutional conditions doctrine, the refusal to fund recipients because they provide abortions using private funds did.¹³⁷ The practical impact of the Texas rider would have been to shut down private resources for abortions, not simply to refuse to pay for abortions.

Similarly, SPRANS CBAE requires that any recipient teach *only* abstinence-only in order to receive these funds.¹³⁸ The recipient is not permitted to teach any other form of sex education, *regardless of the source of the funding* for such programs.¹³⁹ The money dedicated annually to SPRANS dwarfs the current funding level for AFLA, which as noted above should be declared unconstitutional, if not simply dismantled as a waste of taxpayer funding.¹⁴⁰ Even more plainly than its violation of the Establishment Clause, SPRANS-CBAE directly violates the unconstitutional conditions doctrine, even as narrowly defined by *Rust*.

Rehnquist’s own arguments in *Rust* support this analysis. Rehnquist relied upon earlier, more clear-cut unconstitutional conditions cases to distinguish the facts in *Rust*.

In *FCC v. League of Women Voters of California*, we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not “engage in editorializing.” Under that law, a recipient of federal funds was “barred absolutely from all editorializing” because it ‘is not able to segregate its activities according to the source of its funding’ and thus “has no way

¹³⁶ *Rust*, 500 U.S. at 198.

¹³⁷ *Planned Parenthood of Central Texas v. Sanchez*, 2003 WL 21800213 at 17.

¹³⁸ 68 FR 68632-03 (WL 22885319 F.R.).

¹³⁹ *Id.*

¹⁴⁰ Arndorfer, *supra* n. 24 at 590.

of limiting the use of its federal funds to all noneditorializing activities.”¹⁴¹

Rehnquist also wrote that “[t]he regulations do not force the Title X *grantee*, or its employees to give up abortion-related speech; they merely require that such activities be kept separate and distinct from the activities of the Title X *project*.”¹⁴² Prophetically describing the actual effect on a law such as SPRANS-CBAE over a decade before its inception, Rehnquist wrote, “[I]n contrast, our ‘unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” In *Women Voters*,¹⁴³ the effect of the law was that even if a television station received only 1% of its overall income from federal grants, it was barred completely from using private funds for editorial activity.¹⁴³ This circumstance is far more analogous to funding of SPRANS-CBAE than to the Title X program in *Rust*. No matter how much of a state’s funding comes from outside sources, a state cannot receive SPRANS-CBAE funding unless it forgoes the opportunity to each other than abstinence-only, SPRANS-CBAE imposes an unconstitutional condition.

More recently, the Children’s Internet Protection Act (CIPA) was held not to violate the unconstitutional conditions doctrine.¹⁴⁴ CIPA required libraries to use Internet filters as a

¹⁴¹ *Rust*, 500 U.S. at 197.

¹⁴² *Id.* at 173, citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400, 104 S.Ct. 3106, 3127, 82 L.Ed.2d 278; *Regan*, *supra*, 461 U.S., at 546, 103 S.Ct., at 2001, distinguished.

¹⁴³ 468 U.S. 364, 400 (1984).

¹⁴⁴ *U.S. v. Am. Lib. Assn.*, 123 S.Ct. 2297, 2308 (2003), *Healy*, *supra* n. 5.

condition to receiving certain federal subsidies for providing Internet access to library patrons.¹⁴⁵ Rehnquist asserted that the federal government does not penalize libraries that choose not to install the required filtering software; it had just decided not to subsidize unfiltered access to the Internet.¹⁴⁶ Congress was simply insisting “public funds be spent for the purposes for which they were authorized.”¹⁴⁷ The court found that the use of filtering programs helped to carry out a libraries’ mission, so was a permissible condition under a *Rust* analysis.¹⁴⁸ The Court disagreed with the appellees that that CIPA’s filtering requirements “[d]istort the [u]sual [f]unctioning of [p]ublic [l]ibraries” in their efforts to provide comprehensive access to reading material.¹⁴⁹

It could be argued that *Library* supports an argument that Congress can choose to fund certain content-based restrictions on speech. The plurality in *Library* relies on *Rust* in determining that Congress may certainly insist that these ‘public funds be spent for the purposes for which they were authorized.’”¹⁵⁰ The public funding grant in CIPA did not attempt to prevent libraries from using their own funding to provide printed and Internet material, but set conditions on the use of federal funds for Internet access. *Library* noted that libraries are not repositories for all printed materials, and choices were routinely made as to which items were to be made available to the

¹⁴⁵ *Id.*, E-rate and LSTA were federal programs intended to help library patrons obtain material for informational and educational purposes through internet access in public libraries.

¹⁴⁶ *Am. Lib. Assn.*, 123 S.Ct. at 2308.

¹⁴⁷ *Id.*, *Rust*, 500 U.S. at 196.

¹⁴⁸ *Am. Lib. Assn.*, 123 S.Ct. at 2308.

¹⁴⁹ *Id.*, citing *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 543 (2001).

¹⁵⁰ *Id.* at 2308, citing 20 U.S.C. § 9121 (“It is the purpose of [LSTA] (2) to stimulate excellence and promote access to learning and information resources in all types of libraries for individuals of all ages”); S. Conf. Rep. No. 104-230, p. 132 (1996), U.S.Code Cong. & Admin.News 1996, pp. 10, 144 (The E-rate program “will help open new worlds of knowledge, learning and education to all Americans [It is] intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to Americans everywhere via . . . libraries”).

public.¹⁵¹ The court found analogous the situation in which a public television station did not violate principles of free speech by rejecting private speech in its editorial judgment.¹⁵² This is easily distinguished from SPRANS-CBAE analysis, as the issue is not one of conflicting and overwhelming private speech, as in requests to a television station for free air time, or in libraries, where the open expanse of the internet with seemingly endless quantities of pornography and adult-oriented content. The outside world is not clamoring to demand access to the classroom to inflict various opinions and patently commercial appeals on the nations' adolescents. In examining SPRANS-CBAE, there is no conflicting chorus of opinion, nor a flood of misinformation from unknown sources threatening the education of adolescents. Contrarily, experts at preserving the public's health are being prevented from teaching the nations' adolescents to adequately protect themselves. SPRANS-CBAE is an impermissible restriction on the ability of schools to adequately educate their students.

Schools accepting SRPANS-CBAE funds are forbidden from providing information that is effective in reducing the incidence of unintended teen pregnancy and spread of STDs. In *Library*, the librarians were put in the position of filtering out some content that might be offensive. In terms of SPRANS-CBAE, the speech being stifled is the speech that most parents would like their children to hear.¹⁵³ In *Library*, Rehnquist wrote that Stevens "mistakenly" argued that *Rust* was inapposite because *Rust* applied only to cases in which the government sought to communicate a specific message.¹⁵⁴ Certainly the government's attempts to promote

¹⁵¹ *Id.* at 2303-04.

¹⁵² *Id.*, citing *Ark. Ed. TV Commn. v. Forbes*, 523 U.S. 666, 672 -673 (1998).

¹⁵³ See discussion *supra* concerning AFLA and community morals.

¹⁵⁴ *Am. Lib. Assn.*, 123 S.Ct. at 2309. This was Rehnquist's characterization of Stevens's dissent, not mine.

abstinence-only is a specific message, one that as discussed above is inaccurate and also likely violates the Establishment Clause.

The Court has also previously analyzed unconstitutional conditions doctrine for an art-funding program that used content-based criteria in its funding decisions.¹⁵⁵ In *Finley*, the court held that “[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.”¹⁵⁶ The Court was relating the subjective nature of decisions to fund any particular type or piece of art. This situation could not be more inapposite to the nature of public health education. Content based decisions, such as a decision to fund abstinence-only education, when it is clearly ineffective is not in the nature of public health funding. Public health interventions have their genesis in scientific evaluation. Unlike art or editorial content, public health interventions can be evaluated and verified. As discussed previously, the current administration actually now avoids such verification for abstinence-only programs.

In his concurring opinion in *Library*, Justice Breyer argued that a heightened standard of scrutiny should be applied where “competing constitutional interests are potentially at issue.”¹⁵⁷ Breyer reminded the Court of past cases in which the Court asked whether the

harm to speech related interests is disproportionate in light of both the justifications and the potential alternatives.”¹⁵⁸ “What our decisions require is a ‘fit’ between the legislature’s ends and the means chosen to

¹⁵⁵ *Natl. Endowment for the Arts v. Finley*, 424 U.S. 569 (1998).

¹⁵⁶ *Id.* at 585.

¹⁵⁷ *Am. Lib. Assn.*, 123 S.Ct. at 2311 (Breyer, concurring 2003).

¹⁵⁸ *Id.*, citing *See, e.g. Bd. of Trustees of St. U. of N.Y. v. Fox*, 492 U.S. 469; *Denver Area Ed. Telecomm. Consortium V. FCC*, 518 U.S. 727, 740-747 (1997) (plurality opinion); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J. concurring in part); *Red Lion Broad. v. FCC*, 395 U.S.367, 389-390 (1960).

accomplish those ends--a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts . . . a means narrowly tailored to achieve the desired objective.

¹⁵⁹ Breyer opined that even under this heightened scrutiny, CIPA was constitutional.

Applying Breyer's analysis to SPRANS-CBAE further convinces that this law violates the unconstitutional conditions doctrine. Certainly, SPRANS CBAE is not a reasonable fit to any permissible legislative end. If the purpose is to reduce unwanted pregnancy and reduce transmission of STDs among adolescents, it is now clear that the method chosen does not at all fit. *Rust* held that unequal subsidization of one activity to the exclusion of another is allowable if the point is to further permissible goals. With SPRANS-CBAE, clearly this distinction is not met. SPRANS-CBAE fails in its stated goals and must be dismantled, if not directly by the HHS, then by refusal to fund by Congress or through court challenges.

C. Sexual Education and the Exclusion of Gay and Lesbian Students

In their abstinence-only until marriage classes, students are being told they must remain abstinent until they are married. Although eventually these students will grow up and make choices for themselves, the government is attempting to reinforce marriage as the norm. “[T]he government is attempting to compel marriage through sex-education by teaching teenagers that marriage is

¹⁵⁹ (Internal quotation marks and citations omitted.) *Fox, supra*, at 480, 109 S.Ct. 302

the only acceptable condition for sexual expression.”¹⁶⁰ A certain percentage of these students as of yet have no legal opportunity to engage in marriage, the students who are lesbian or gay.¹⁶¹ In effect, these students are being told that they should never have sex. The evolution of the recognition of privacy rights from *Griswold*,¹⁶² *Eisenstadt*,¹⁶³ *Roe v. Wade*,¹⁶⁴ *Casey*,¹⁶⁵ and now through *Lawrence*,¹⁶⁶ has revealed citizens’ rights of autonomy over their bodies from their right to use contraception, to have an abortion, and now to the right to choose with whom they share sexual relations.¹⁶⁷ Efforts through abstinence-only until marriage programs to coerce gay and lesbian students to forever remain celibate serve to make these programs contrary to gays and lesbians’ substantive due process rights. “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate contact.”¹⁶⁸ As previously reported, adolescents who engage in MSM are at especially high risk for STDs, and are not served by abstinence-only programs at all.

¹⁶⁰ For an in depth discussion on the conflation of marriage and abstinence only education for both adolescents and welfare recipients, see Ruthann Robson, *Assimilation, Marriage and Lesbian Liberation*, 75 Temple L. Rev. 709 (2002).

¹⁶¹ The actual percentage is widely debated, but the actual number is not really relevant for the purposes of this discussion. Constitutional infringements by laws are not minimized by the fact that it affects relatively few people. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 837-838 (1992) “The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper inquiry is for whom the law is a restriction, not the group for whom it is irrelevant.” *Id.*

¹⁶² *Griswold v. Conn.*, 381 U.S. 479 (1965) (invalidating state laws that denied married people access to contraceptives and contraceptive birth control counseling).

¹⁶³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a law that prohibited distribution of contraceptives to unmarried people).

¹⁶⁴ 410 U.S. 113 (1973), held that a woman has a right to an abortion under a due process analysis.

¹⁶⁵ *Planned Parenthood of S.E. Pa.*, 505 U.S. at 833 (ruling on a state law forbidding 123 S. Ct. at 2472).

¹⁶⁷ *Id.* at 2484.

¹⁶⁸ *Id.* at 2475.

Although some abstinence-only programs are written as if lesbian and gay students do not exist,^{168x} others take a decidedly anti-homosexual tone. Abstinence-only programs that discuss homosexuality often discuss it as a purely physical concept, in terms of attraction only for sex and not in terms of relationships. One of the typical abstinence-only programs, FACTS, defines homosexuality as a “persistent and predominant attraction of a sexual-genital nature to a person of one’s own sex.”^{168a} Another program counsels parents and teachers that “many homosexual activists are frustrated and desperate over their own situation and those of loved ones, many are dying, in part due to ignorance. Educators who struggle to overcome ignorance and instill self-mastery in their students will inevitably lead them to recognize that some people with AIDS are now suffering because of choices that they made.”^{168b} The message is clear. Homosexuals are immoral.

There is a diminishing conservative belief that lesbians and gays have their sexual orientation because of their own choice, or “preference.” Therefore, adherents to this notion may believe that lesbians and gays do indeed have the right to marry, but they must marry members of the opposite sex. ¹⁶⁹ Quoting *Casey* in *Lawrence*, Justice Stevens wrote of these “choices,”

[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not

^{168x} WAIT training, for instance, noted in M.E. Kempner, *Toward a Sexually Healthy America*, 46, SIECUS available at siecus.org.

^{168a} FACTS, *Middle School Teacher’s Guide* at 22, cited in M.E. Kempner, *Toward a Sexually Healthy America*, 47. SIECUS available at siecus.org.

^{168b} Facing Reality, Parent/Teacher Guide, P/T 19, cited in M.E. Kempner, *Toward a Sexually Healthy America*, SIECUS available at siecus.org.

¹⁶⁹ *Id.* at 2472.

define the attributes of personhood were they formed under compulsion of the State.¹⁷⁰

Extending this protection in *Lawrence*, he held “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”

The decision in *Lawrence* takes pains to distinguish that the petitioners were not minors.¹⁷¹

Although almost all of the adolescents being taught through abstinence-only until marriage education are indeed minors, the decision in *Lawrence* recognizes the fundamental liberties that all citizens may enjoy. Adolescent students must also be taught sexual education that is relevant to their lives for their protection. The fact that they are not yet of the age of majority does not obviate the need to protect them from the adult activities in which almost half of them engage. Just as heterosexual adolescents must be protected from disease, gay and lesbian students must too. Fortunately, formerly illegal consensual non-procreative acts once labeled “sodomy” are no longer criminal. “The State cannot demean their existence or control by making their private sexual conduct a crime.”¹⁷² If these liberties are equal among all citizens, then teaching heterosexual students that it is permissible to have sexual relations only in the confines of marriage, apparently applies only when they are adults. What of the adolescents who are gay or lesbians, but will not be able to marry even as adults? They are apparently being told to never have sexual relations. Although *Lawrence* explicitly discusses adults’ rights to choose with whom they have relationships sexual and otherwise, this right must be inferred to gay and lesbian adolescents in their near futures. All abstinence-only efforts anticipate adolescents refraining from sex until they are adults, but as it is clear that not all of them do, they must be educated to

¹⁷⁰ *Id.* at 2481.

¹⁷¹ “The present case does not involve minors.” *Id.* at 2484.

protect their lives now so that they may enter adulthood disease-free; gay and lesbian teens are no less deserving of this protection.

While the effect of these programs might please many who believe gays and lesbians are immoral, it is not the job of our lawmakers and courts to deny substantive rights to certain classes of citizens. In *Lawrence*, the court found that *Bowers* must be overruled because homosexuals may also assert their autonomy in certain personal matters as do heterosexuals.¹⁷³

Although the Court in *Lawrence* expressly overruled *Bowers* in his dissent, Scalia noted, “nowhere does the Court's opinion declare that homosexual sodomy is a “fundamental right.” He opined that the majority’s opinion left untouched *Bowers*’ central conclusion; there is no fundamental right to engage in homosexual sodomy.¹⁷⁴ Indeed the majority does not expressly state that the right to engage in homosexual sodomy is a fundamental right, however, the Court did recognize the right of everyone to make “intimate choices central to personal dignity and autonomy” and held they were protected by the Fourteenth Amendment.¹⁷⁵ Indeed, in his majority opinion, Kennedy held that “The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”¹⁷⁶ Contrary to Scalia’s assertions, although Kennedy does not

¹⁷² *Id.*

¹⁷³ *Id.* at 2482.

¹⁷⁴ *Id.* at 2488, (Scalia dissenting).

¹⁷⁵ *Id.* at 2481

¹⁷⁶ *Id.* at 2484, citing *Planned Parenthood of S.E. Pa.*, 505 U.S. at 847. “[T]he *Lawrence* majority recognized that the liberty interest protected in earlier substantive due process cases is

expressly state this proposition, the choice of an adult's choice to engage in same-sex private sexual conduct must now be considered a fundamental right - -and after *Lawrence*, it is clear that no state can enforce a law forbidding homosexual sodomy among consenting adults.

Through abstinence-only until marriage programs, gay and lesbian students are being told that they must forgo their rights to enjoyment of their bodies, as they are not able to legally marry in this country. No sex until marriage means no sex ever for gay and lesbian youths. The funding of programs that infringe on the Constitutional rights of this group should be struck down by application of substantial due process, if not under the unconstitutional conditions doctrine discussed supra. "Equal treatment and due process right to demand respect for conduct protected by substantive guarantee of liberty are linked. A decision on due process affects right to equal treatment."¹⁷⁷

These programs may not legally suppress the rights of gay and lesbian adolescents, just because the idea of protecting the health of these adolescents may not be popular among citizens who would rather not address gay and lesbian issues. Even Rehnquist, the majority author in *Rust* recognized the "Court's previous decisions holding that government subsidies aimed at suppressing particular ideas violated the unconstitutional conditions doctrine."¹⁷⁸ The

the freedom to make *decisions and choices* in matters affecting a person's autonomy and selfhood." Reginald Oh, Supreme Court Watch, State and Local Law News, Volume 27, Number 2, Winter 2004. on page 8-9. *See generally* for a discussion of the distinction between the liberty to choose to engage in conduct and the liberty to engage in conduct.

¹⁷⁷ *Id.* at 2482.

¹⁷⁸ *Rust*, 500 U.S. at 192 citing *Wells* at 1726,

government cannot silence various viewpoints by purchasing the citizens' fundamental rights.¹⁷⁹ Laws may not discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.¹⁸⁰ All abstinence-only until marriage federal funding programs are inherently unconstitutional and must be struck down by the courts or dismantled legislatively.

IV. After Dismantling Abstinence-only Programs

Once AFLA and SPRANS-CBAE have been dismantled, the federal government should divert its funding and attention to funding comprehensive sexual education to help reduce unintended pregnancies and the spread of STDs. Comprehensive educational outreaches could only help to further reduce the incidence of unwanted teen pregnancy and STDs. Congress should seek coordination for these efforts and those that seek to prevent HIV infection as well. The CDC should report scientifically valid information on its website, and not be censored to only promote politically based viewpoints. As previously stated, one program will not work for the entire nation. With a nation as large and as diverse as the United States, there must be some flexibility in the creation of effective programs.

There may be concern for parents with certain religious convictions who do not want their children exposed to comprehensive sex education. Although over eighty percent of parents polled want their children to receive comprehensive sex education in school,¹⁸¹ it is not

¹⁷⁹ Linda Maher, *Government Funding in Title X Projects: Circumscribing the Constitutional Rights of the Indigent: Rust v. Sullivan*, 29 Cal. W. L. Rev. 143, 146 (1992); *Rust*, 111 S. Ct. at 1764-1766.

¹⁸⁰ *Rust*, 500 U.S. 193, citing *Regan* 461 U.S. at 549.

¹⁸¹ SIECUS, *Public Support for Sexuality Education*, http://www.siecus.org/school/sex_ed/sex_ed0002.html (accessed Feb. 23, 2003).

necessary to compel every student to receive this instruction. Efforts should be made to educate as many adolescents as possible, as the larger is the group of adolescents who are uneducated, the greater is the potential for spreading STDs and incidence of unwanted pregnancy. Community standards should be examined to ensure the best approach is used for any given region, as supported by rigorous scientific research.

Studies have shown that programs should be tailored to the participants to be most effective. Teen sexuality education is and should remain a public health issue, not a political/religious forum. Conflicts occur between public health programs and religious principles in other issues, for instance mandatory vaccination laws.¹⁸² All states require diphtheria measles and rubella vaccines.¹⁸³ Additional vaccinations are required in other states.¹⁸⁴ Medical exceptions permit children allergic or susceptible to adverse reactions an opportunity to avoid vaccination.¹⁸⁵ Compulsory vaccinations may indeed violate certain religions' edicts but have nonetheless been ruled constitutional.¹⁸⁶ Although not required under the federal Constitution, all but two states currently permit parents to opt their children out of vaccination programs if they have religious objections.¹⁸⁷ The children not immunized are most at risk, and are also potential carriers of the disease for which immunization is possible.

¹⁸² Lawrence O. Gostin, *Public Health Law; Power, Duty, Restraint*, 182-186 (U. of Cal. Press 2000).

¹⁸³ Lawrence O. Gostin, *Public Health Law & Ethics: A Reader*, tbl. 6, 382 (U. of Cal. Press 2002).

¹⁸⁴ *Id.*

¹⁸⁵ Gostin, *supra*, n. 182 at 181.

¹⁸⁶ *Jacobson v. Mass.*, 197 U.S. 11 (1905).

¹⁸⁷ Mississippi and West Virginia are those two states. *Zucht v. King*, 260 U.S. 174 (1922) – compulsory vaccinations permissible as a condition to attending school. For a review of federal and state vaccination laws, *see supra*, n. 189 at 379.

States could, and should permit religious exemptions for participants whose religious beliefs would be offended by comprehensive sexual education programs.¹⁸⁸ The First Amendment forbids Congress from making laws prohibiting the free exercise of religion.¹⁸⁹ It could be argued that compulsory sex education would run afoul of this protection. When examining vaccination laws, the Supreme Court found that the right to free exercise of religion does not obviate an adherent from compliance with a “valid and neutral law of general applicability.”¹⁹⁰ Although most parents want their children to receive comprehensive sex education, the parallels between vaccination and sex education may not be close enough to warrant compulsory education on all teens. Most of the diseases for which we have pharmaceutical immunization are not spread largely through sexual contact. The element of choice must also be considered when debating whether students should be able to “opt-out” of comprehensive sexual education training.

Abstinence training may indeed be most appropriate for certain students immersed in their faith. Some students report that their religion is a main factor in keeping them celibate.¹⁹¹ Their “freedom to act according to their religious beliefs is subject to a reasonable regulation for the benefit of society as a whole.”¹⁹² Requiring adolescents committed to abstinence to undergo

¹⁸⁸ Many already do. Florida: Fla. Stat. Ann. § 1003.42 (3) (2003) (allowing a student to be exempted from sex education or HIV/AIDS instruction) “Any student whose parent makes written request to the school principal shall be exempted from the teaching of reproductive health or any disease, including HIV/AIDS, its symptoms, development, and treatment. A student so exempted may not be penalized by reason of that exemption. Course descriptions for comprehensive health education shall not interfere with the local determination of appropriate curriculum which reflects local values and concerns.”

¹⁸⁹ U.S. Const. amend I.

¹⁹⁰ *Empl. Div. v. Smith*, 494 U.S. 872 (1990).

¹⁹¹ SIECUS, *The Truth about Adolescent Sexuality*, http://www.siecus.org/pubs/fact/FS_truth_adolescent_sexuality.pdf (Fall 2003).

¹⁹² *Wright v. De Witt Sch. Dist.*, 385 S.W.2d 644, 648 (Ark. 1965).

sexual education may not be viewed as a reasonable regulation, despite the fact that not all of these students will likely remain celibate. Making any public health effort compulsory provokes popular resistance and fear or distrust of health officials, so compulsion should be avoided in public health efforts whenever possible.

Unfortunately, many students receiving abstinence-only training, including some of those who also take virginity pledges, fail in their goal to remain celibate. These students who receive no education to protect themselves from STDs and unintended pregnancy will be ill equipped should they decide to engage in sexual behavior. Adding to this problem, as noted earlier, many who engage in some sexual behaviors are not convinced these activities are sexual, so do not consequently fear the risk of sexually transmitted diseases, as they do not believe they have been engaging in “sex.”¹⁹³ Parents who choose to opt-out their children for religious reasons should be provided information concerning the public health risks of their child not being educated to protect themselves against pregnancies and STDs. Outbreaks of disease for which vaccines were available have occurred in various religious communities that refused vaccination for protection from these preventable epidemic diseases.¹⁹⁴ Parents should be informed of these risks when opting their child out of comprehensive sexual education. In spite of their belief that their children will remain celibate, parents should be informed of the numbers of students who fail to remain chaste, and of the potential repercussions of their failure not only to themselves but of others in the community.

¹⁹³ See above discussion of definitions of sex and abstinence.

¹⁹⁴ Children have died from preventable diseases because of their parents’ refusal to have them immunized. Daniel A. Salmon, et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws*,” 282 JAMA 47, 47-53 (July 7, 1999).

V. Conclusion

Although the abstinence-only programs may have been born of a sincere desire to help adolescents avoid unintended pregnancy and STD infection, it is now clear they do not serve that purpose. Whether or not the moral values of the nation at one time supported denying adolescents access to potentially lifesaving information, as evidenced by the wishes of parents, they do not now. These programs are ineffective and a waste of taxpayer money.

If not dismantled for their ineffectiveness, these programs must be invalidated by the courts for their failure to comply with the Constitution. Both AFLA and SPRANS-CBAE serve to further only the impermissible goal of advancing a particular religious viewpoint. SPRANS-CBAE further imposes unconstitutional conditions on the acceptance of federal funds, which also renders it unconstitutional. These programs also fail to address gay and lesbian adolescents, marginalizing them and attempting to coerce them into sexless lives. The current administration should scrap its plans to increase funding for these ineffective and unconstitutional programs and support coordinated proven public health approaches to address the problems of unwanted pregnancy and all STDs among this nation's adolescents.

Congress could act to ensure funding is diverted from these programs, by refusing to fund AFLA and by carving out the block grant that permits the Secretary of HHS the discretion to squander taxpayer money on SPRANS-CBAE. If Congress fails to act, the courts must strike down these funding programs or compel that the education of our nation's adolescents reflect that they live in the 21st century, not some imagined sexless era that exists only in 1950's sitcoms. Those

realities include the fact that despite all efforts to the contrary, many adolescents will have sex. Further, a substantial number of our nation's youth are being completely ignored, as the programs make no allowance that many of this nation's adolescents are lesbian or gay. Failure to protect gays and lesbians with meaningful education will exacerbate the already alarming increase of STDs and HIV that is being documented among young people, and in even higher rates among the nation's MSM.

The funding of these programs do not comport with the nation's morals, they instead further the goals that were formerly seen as "coinciding" with religious ideals. Now that they have been stripped of their pretense of furthering permissible goals, they must be abolished and replaced with programs that actually work. With fierce competition for public funding, abstinence-only programs that not only are ineffective for their stated purpose, but also conflict with state and federal efforts to control disease must be eliminated immediately.