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# RECOVERING SUBSIDIARITY IN FAMILY LIFE EDUCATION

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## ABSTRACT

This article provides a rigorous analysis of the legitimacy of continuing to rely on and promote school-based family life education, as a way of addressing concerns associated with sexual activity by adolescents. The issue is crucial because empirical evidence strongly suggests that a school-based approach, regardless of curricular content, has failed. For reasons grounded in law and policy, this article advocates that states should retreat from school-based family life education and, instead, recover the insights of the philosophical principle of subsidiarity. Recovering subsidiarity means fully respecting and giving effect to the parental right and duty to educate children in matters relating to morality, family life, and sexuality. Leaving this crucial task primarily to the family ensures not only efficient allocation of responsibility within society, but also a superior environment for effective and comprehensive family life education. This article also explores the key impetus behind the movement to get family life or sex education into schools, a movement grounded in a variety of ideologies. Because these ideologies are far removed from any genuine concern for the health and well-being of adolescents, the state interests often asserted as reasons for a school-based approach are insufficient to warrant continued infringement of the parental right and duty relating to the education and formation of children. Recovering subsidiarity will foster a parent-centered approach that is more likely to genuinely safeguard the well-being and reproductive health of the vast majority of adolescents.

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##### INTRODUCTION

Recent changes to federal funding provisions may intensify discussion at the state level regarding the provision of sex education—or family life education—in elementary and secondary schools in the United States.<sup>1</sup> What is at stake is hugely important: the health and well-being of children and adolescents. Statistics show that the percentage of youth in the United States suffering from sexually transmitted infections (STIs) continues to rise at alarming rates and that most STIs carry with them a potential for serious long-term consequences—especially for young women.<sup>2</sup> The rates of teen pregnancies

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1. The 2010 Budget proposed to provide grants to “fund teen pregnancy prevention programs . . . that replicate the elements of one or more teenage pregnancy prevention programs that have been proven through rigorous evaluation to delay sexual activity, increase contraceptive use (without increasing sexual activity), or reduce teenage pregnancy . . .” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, app. at 490 (2009), *available at* <http://www.gpo.gov/fdsys/pkg/BUDGET-2010-APP/pdf/BUDGET-2010-APP.pdf>. A key aspect of the change was the shifting of federal assistance away from “abstinence education for adolescents” and, instead, towards “teen pregnancy prevention.” *Id.*

2. The “CDC estimates that a total of almost 19 million new sexually transmitted infections occur each year, almost half of which are among 15- to 24-year-olds.” *Press Release: CDC Report Finds Adolescent Girls Continue to Bear a Major Burden of Common Sexually Transmitted Diseases*, CTNS. DISEASE CONTROL & PREVENTION (Nov. 16, 2009), <http://www.cdc.gov/nchhstp/newsroom/STDsurveillancepressrelease.html> [hereinafter *CDC Press Release*]. In the United States, chlamydia and gonorrhea are “the two most commonly reported infectious diseases.” *Id.* In 2008, approximately 1.2 million cases of chlamydia and nearly 337,000 cases of gonorrhea were reported. *Id.*

Adolescent girls ages 15–19 years had the largest reported number of chlamydia and gonorrhea cases (409,531) when compared to any other age group, followed closely by women ages 20–24 . . . . While adolescent males have a similar prevalence of STDs, biological differences place females at greater risk for STDs than males. Additionally, the health consequences are more severe among females than males . . . . CDC estimates that STDs cost the U.S. health care system as much as \$15.9 billion annually.

*Id.* As noted by the director of CDC's National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, “[w]hen you take into account the severe health consequences of STDs

and abortions, although improving, remain a serious concern.<sup>3</sup> Pregnancy is riskier for a teen than an adult,<sup>4</sup> and children of teens often are deprived of the type of security recognized as important for optimal well-being.<sup>5</sup> Further, research shows that abortions can have significant adverse health effects on women<sup>6</sup>—especially repeat abortions,<sup>7</sup> which are more likely to occur if the first abortion is experienced as a teen.<sup>8</sup> For many, reduction of these adverse consequences is the reason for any type of sex education in the school setting.

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and the millions of Americans infected every year, it is clear that much more work needs to be done to prevent unintended long-term health issues . . .” *Id.* Fertility loss is emerging as a key consequence for young women who experience STIs. *See infra* note 87 and accompanying text.

3. Notably, the data regarding pregnancies and abortions reflect downward rather than upward trends, meaning that these risks do not present a crisis in the same way that the STI rates do. The CDC reports that

[p]regnancy rates declined steadily for teenagers from 1990 to 2004, by 38 percent overall; the rate fell from its historic peak in 1990, 116.8 per 1,000 aged 15–19 years, to 72.2 in 2004 . . . . The 2004 pregnancy rate for teenagers was the lowest ever reported since this series of pregnancy estimates began in 1976.

Stephanie J. Ventura et al., *Estimated Pregnancy Rates by Outcome for the United States, 1990–2004*, 56 NAT’L VITAL STAT. REP., Apr. 14, 2008, at 4, [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_15.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_15.pdf) (citation omitted). These are good trends, but more progress can be made in reducing the rate.

The number of abortions has also declined, but the rate for youth remains a real concern. For example,

[a] total of 820,151 legal induced abortions were reported to CDC for 2005 from 49 reporting areas . . . . For 2005, the highest percentages of reported abortions were for women who were known to be unmarried (81%), white (53%), and aged <25 years (50%). . . . For the 46 reporting areas that have consistently reported since 1995, [t]he abortion rate declined from 1995 to 2000, but remained unchanged since 2000.

Sonya B. Gamble et al., Ctrs. for Disease Control & Prevention, Dep’t of Health & Human Servs., *Abortion Surveillance—United States, 2005*, 57 MORBIDITY & MORTALITY WKLY. REP., Nov. 28, 2008, at 1, available at <http://www.cdc.gov/mmwr/pdf/ss/ss5713.pdf>.

4. *See, e.g., Preeclampsia: Risk Factors*, MAYO CLINIC (Apr. 21, 2011), <http://www.mayoclinic.com/health/preeclampsia/DS00583/DSECTION=risk-factors> (explaining that the risk of preeclampsia is greater for pregnant women under the age of 20 and over the age of 40).

5. *See* Jennifer S. Manlove et al., *Outcomes for Children of Teen Mothers from Kindergarten Through Adolescence*, in *KIDS HAVING KIDS: ECONOMIC COSTS & SOCIAL CONSEQUENCES OF TEEN PREGNANCY* 161, 163 (Saul D. Hoffman & Rebecca A. Maynard eds., 2d ed. 2008).

6. *See* Moira Gaul, *How Abortion Harms Women’s Health*, FAM. RES. COUNCIL, <http://www.frc.org/content/how-abortion-harms-womens-health> (last visited Feb. 13, 2012) (citing research that found physical and psychological complications of abortions).

7. *See, e.g., Physical Risks: Significant, Even Deadly, Risks of Abortion*, THEUNCHOICE.COM, <http://www.unchoice.info/pdf/FactSheets/PhysicalRisks.pdf> (last visited Feb. 13, 2012) (explaining how women with multiple abortions are more likely to have pre- or post-term deliveries, which are dangerous to the child’s health).

8. “About half of all U.S. women having an abortion have had one previously.” Susan A. Cohen, *Repeat Abortion, Repeat Unintended Pregnancy, Repeated and Misguided Government Policies*, 10 GUTTMACHER POL’Y REV., Spring 2007, at 8, 8, available at <http://www.guttmacher.org/pubs/gpr/10/2/gpr100208.pdf>. Quite expectedly, given that

In recent years, the rhetoric surrounding school-based sex education in the United States has focused almost solely on the question of whether schools should provide “abstinence-based” programs or, instead, use an approach generally referred to as “comprehensive sex education.”<sup>9</sup> A new approach to federal funding is not likely to broaden the scope of the debate. A key aspect of the approach initiated in 2010 was the emphasis on “evidence based” programming.<sup>10</sup> That is, federal funds would be available for programs that can show evidence of positive outcomes. The debate, then, likely would not shift away from a focus on the two prevalent competing approaches, but, rather, each side simply will come to the table armed with a supply of purportedly favorable empirical studies. That would be unfortunate, because existing empirical studies show deficiencies in both current approaches.

Instead, state legislators must move beyond the rhetoric and engage in careful analysis of how best to address the enduring and increasing concerns about helping children and adolescents avoid the significant health risks associated with premature sexual activity and attain a satisfying adult family life. States that are serious about

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she is representing the Guttmacher/Planned Parenthood coalition, Cohen argues that better access to contraceptives would ease the growing concern with repeat abortions. *Id.* at 9. However, Cohen acknowledges that

[j]ust as with women having their first abortion, however, the majority of women having their second or even their third abortion were using contraceptives during the time period in which they became pregnant. In fact, women having a repeat abortion are slightly more likely to have been using a highly effective hormonal method [of contraception] (e.g., the pill or an injectable).

*Id.*

The idea that better access to contraceptives is a solution is also refuted by the experiences of other countries that have a tradition of more ready access to contraceptives. In the UK, recent research has revealed that “[t]he number of abortions performed on teenage girls who have had at least one before has risen by almost 70 per cent [sic] since 1991 . . . .” Fiona Macrae, *Repeat Abortions Among Teenage Girls Have Risen by 70%*, MAIL ONLINE (Jan. 24, 2009, 12:08 AM), <http://www.dailymail.co.uk/health/article-1127083/Repeat-abortion-teenage-girls-risen-70.html>. Specifically, the data showed that

[i]n 2007, 5,897 girls under 20 had their second, third or even fourth termination. Sixteen years earlier, in 1991, the figure stood at just 2,934 . . . . The analysis by scientists at Nottingham University, found that—even taking into account the rise in abortion among all age groups—the proportion of repeat terminations carried out on teenagers rose by 68 per cent in 16 years.

*Id.*; see also *Teen Abortion Risks: Fact Sheet*, THEUNCHOICE.COM (Jan. 2008), <http://www.unchoice.info/pdf/OnePageFactSheets/TeensSheet1.pdf> (discussing the increased physical and psychological risks of teen abortion).

9. See SHANNAN MARTIN ET AL., HERITAGE FOUND., COMPREHENSIVE SEX EDUCATION VS. AUTHENTIC ABSTINENCE: A STUDY OF COMPETING CURRICULA v (2004).

10. See OFFICE OF MGMT. & BUDGET, *supra* note 1, app. at 490 (making funding available for “teenage pregnancy prevention programs that have been proven through rigorous evaluation to delay sexual activity, increase contraceptive use (without increasing sexual activity), or reduce teenage pregnancy . . .”).



safeguarding the reproductive health and overall well-being of adolescents will be willing to step back and begin the analysis and discussion anew. Fresh analysis readily highlights that the politically charged debate fails to raise a key threshold question: whether school-based family life education for children and adolescents is the most effective and appropriate approach, or whether states should instead find ways to assist parents and other family members so that they can and will effectively provide an appropriate education relating to sexuality to children in their charge. This is a crucial question because data strongly suggests that a parent-centered approach would be the best way to address the situation for the vast majority of adolescents.<sup>11</sup>

This article provides a rigorous analysis of the legitimacy of continuing to rely on and promote a school-based approach to address the concerns associated with sexual activity by adolescents. The analysis strongly leads to the conclusion that parents and family have the right and, further, the duty to educate their children in matters related to sexuality. Leaving this crucial task to the family ensures efficient allocation of responsibility within society, and, further, provides a superior environment for effective education in sexuality. The article also explores the key impetus behind the movement to get sex education into the schools and concludes that state interests, often asserted as reasons for a school-based approach, are insufficient to warrant infringement of the parental right and duty relating to the education and formation of children.

Shifting to a parent-centered approach, however, does not rule out the need for State assistance to parents. In a manner similar to Michelle Obama's recently launched campaign to help parents address the problem of childhood obesity,<sup>12</sup> the State can and should help parents—in part by helping them to appreciate the important contribution that they are uniquely able to provide in genuinely safeguarding the health and well-being of adolescents; and, in part, by

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11. As high risk groups tend to include those adolescents who lack effective parents or caregivers, a "parent-centered" approach logically will not be the solution. See, e.g., Maria R. de Guzman & Kathy R. Bosch, *High-Risk Behaviors Among Youth*, UNIV. OF NEB.-LINCOLN EXTENSION (July 2007), available at <http://www.ianrpubs.unl.edu/pages/publicationD.jsp?publicationId=786> (positing that poor parenting and lack of family support are factors that predispose youth to risky behaviors, including premature sexual activity). For these groups too, however, effective solutions likely are not to be found simply by choosing between the two popularly touted conflicting approaches.

12. See *About Let's Move*, LET'S MOVE!, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited Feb. 13, 2012) ("*Let's Move!* is about putting children on the path to a healthy future . . . Giving parents helpful information and fostering environments that support healthy choices. Providing healthier foods in our schools. Ensuring that every family has access to healthy, affordable food. And, helping children become more physically active.").

ensuring that appropriate information and materials that will enable them to be effective educators are readily accessible and that schools help by reinforcing clear and accurate messages regarding genuine reproductive health.

#### I. AS POPULARLY FRAMED, THE PUBLIC DEBATE IS MISLEADING AND MISGUIDED

As noted, the public debate has focused almost solely on the question of whether schools should provide “abstinence-based” programs or, instead, use an approach generally referred to as “comprehensive sex education.”<sup>13</sup> In brief, abstinence-based programs are premised on the view that delaying sexual activity until one has found a life-long partner is the best way to safeguard a person’s health and well-being and that teens are capable of waiting.<sup>14</sup> In contrast, programs labeled as “comprehensive” are grounded in the premise that, although such delay may in fact be best in terms of health, teens will not wait, and thus it is imperative that teens “be prepared.”<sup>15</sup> More specifically, a comprehensive study of the curricular content of both approaches identified the following key aspects of each approach.

Abstinence programs present human sexuality in a holistic manner.<sup>16</sup> The curricula teach youth that sexuality is not primarily about short-term physical passion, but, rather, involves important social and psychological factors.<sup>17</sup> In particular, the programs teach that human sexuality involves long-term emotional bonding.<sup>18</sup> Emphasis is placed on love, intimacy, and commitment as a way to attain long-term happiness.<sup>19</sup> The programs instruct teens about differences between lust, infatuation, and love—with love being understood as genuine caring for another and the well-being of the other.<sup>20</sup> The programs teach that refraining from casual sex is not just a means to avoid immediate problems such as pregnancy and STIs, but, rather, is a pathway leading to respect for one’s self and others

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13. See MARTIN ET AL., *supra* note 9, at v.

14. *Id.* at ix.

15. See *id.* at ix–x.

16. *Id.* at ix, 25, 57.

17. *Id.* at ix, xv, 25, 57.

18. *Id.* at ix, 26, 47, 57.

19. MARTIN ET AL., *supra* note 9, at ix, 25–27, 47, 57.

20. For example, a typical curricula will include statements such as, “[t]o keep a sex life strong, there must be commitment, love, feelings of comfort, a willingness to sacrifice for each other, and many, many more things!” or “[i]n the shelter of a good marriage, the couple experiences companionship, helpfulness, trust, completeness, and a sense of security and well-being.” *Id.* at 27 (citations omitted). For the basic requirements of an abstinence program qualifying for federal funds, see 42 U.S.C. § 710 (2010).



and to healthier relationships and, thus, also constitutes a path more likely to lead to a satisfying long-term committed relationship during adult life.<sup>21</sup>

The content of the so-called “comprehensive” programs generally portray human sexuality as merely a physical process that can be enhanced with knowledge and practice.<sup>22</sup> The curricula strive to expose adolescents to and make them comfortable with a variety of aspects of sexuality.<sup>23</sup> A key emphasis is placed on values clarification and on consequences of unprotected sexual activity.<sup>24</sup> Substantial time and material (approximately 30% of content) is devoted to describing various types of contraception and the pros and cons of each.<sup>25</sup> Abstinence is described in passing as an option, but it receives little support.<sup>26</sup> Indeed, the study found that the nearly 1000 pages of content in the nine comprehensive programs reviewed contained fewer than ten sentences encouraging teens to wait “until they were older” before becoming sexually active.<sup>27</sup> At the same time, in an attempt to urge the use of condoms, “many curricula instruct teens that condoms are ‘fun’ and ‘sexy,’” and “repeatedly remind teens that they should always know where to find condoms, that they never need parental permission to obtain them, and that using condoms is something they should be proud of.”<sup>28</sup>

At the pragmatic level, the objective of the so-called “comprehensive” agenda is to help ensure that adolescents are comfortable with the idea of engaging in sexual activity and that, when they do so, they will use methods that at least somewhat protect them from real and known serious risks.<sup>29</sup> The objective of the so-called “abstinence”

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21. MARTIN ET AL., *supra* note 9, at 57.

22. *Id.* at ix.

23. *Id.* at x.

24. *Id.* at ix.

25. *Id.* at ix–x, 11.

26. *Id.* at vii, x, 11.

27. MARTIN ET AL., *supra* note 9, at 30, 58 (internal quotation marks omitted).

28. *Id.* at 19. For example, curricula will include statements such as, “[g]o to the store together. Buy lots of different brands and colors. Plan a special day when you can experiment. Just talking about how you’ll use all of those condoms can be a turn on.” *Id.* at 39 (citation omitted). These curricula may also include visualization exercises such as: “Imagine you are walking up to the counter with a box of condoms. You are calm and relaxed . . . The clerk puts the box of condoms in a bag. You say ‘thanks’ and walk away, feeling good about pulling this off.” *Id.* at 37–38 (citation omitted).

29. *Id.* at vii, ix–x, 11. Although some proponents of the comprehensive approach may assert that increasing contraceptive use will reduce the abortion rate, statistics exist that refute that claim. See José Luis Dueñas et al., *Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997–2007*, 83 *CONTRACEPTION* 82, 82 (2011). Dueñas’s study “was designed to acquire information about the use of contraceptive methods in order to reduce the number of elective abortions.” *Id.* In order to carry out the study, beginning in 1997, one of the study teams surveyed “representative samples of Spanish women of childbearing potential (15–49

agenda is to help ensure that adolescents eliminate those serious risks by avoiding the activity that gives rise to the risks and also to help them attain greater satisfaction in life by virtue of understanding sexuality as part of an otherwise caring and committed relationship.<sup>30</sup> As popularly framed, however, the public debate is misleading and misguided. It is misleading because the characterizations and terminology mask what is really at stake. It is misguided because both approaches are deficient.

#### *A. Current Characterizations and Terminology Are Misleading*

The popular rhetoric surrounding the issue of sex education is misleading for several reasons. Foremost, the basic manner of characterizing school-based programs is simply inaccurate. The popular rhetoric suggests that most school courses use an abstinence approach, and that the general failure of abstinence-based programs is the reason for the alarming increases in rates of STIs and pregnancies.<sup>31</sup> In reality, the content of the majority of school-based courses includes key components of the content promoted in a comprehensive-based approach.<sup>32</sup> A good snapshot of what has been taught in school-based sex education is provided by a Kaiser Family Foundation study published in 2000, entitled “Sex Education in America” (the 2000 Kaiser Study).<sup>33</sup> According to the study, students report that a comprehensive approach is used in 72% of seventh and eighth grade courses, 85% of ninth and tenth grade courses, and 87% of eleventh and twelfth grade courses.<sup>34</sup> Indeed, a substantial majority of students surveyed

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years) . . . every 2 years to gather data of contraceptive methods used.” *Id.* Researchers found that an increase in contraception use was accompanied by an increase in abortions. *Id.* More specifically,

During the study period, 1997 to 2007, the overall use of contraceptive methods increased from 49.1% to 79.9%. The most commonly used method was the condom (an increase from 21% to 38.8%), followed by the pill (an increase from 14.2% to 20.3%). Female sterilization and IUDs decreased slightly and were used by less than 5% of women in 2007.

*Id.* Despite the increase in use of the condom and the pill, “[t]he elective abortion rate increased from 5.52 to 11.49 per 1000 women.” *Id.*

30. MARTIN ET AL., *supra* note 9, at ix, 25–27, 47, 57.

31. See, e.g., Amy Schwarz, *Comprehensive Sex Education: Why America’s Youth Deserve the Truth About Sex*, 29 HAMLINE J. PUB. L. & POL’Y 115, 117–18 (2007) (arguing that abstinence-only education has failed America’s youth).

32. See TINA HOFF ET AL., HENRY J. KAISER FAMILY FOUND., SEX EDUCATION IN AMERICA: A SERIES OF NATIONAL SURVEYS OF STUDENTS, PARENTS, TEACHERS, AND PRINCIPALS 3 (2000), available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13531> [hereinafter 2000 KAISER STUDY].

33. See *id.* at 2. The surveys were taken in 1999, and published in 2000. *Id.*

34. See *id.* at 17 tbl. 7. The responses of teachers and principals were consistent, but resulted in a slightly different breakdown. Teachers described the courses as “comprehensive” in 48% of seventh and eighth grade courses, 69% of ninth and tenth grade courses,

reported that some of their courses included topics such as “how to use condoms” (seventh and eighth grades, 59%; ninth and tenth grades, 74%; eleventh and twelfth grades, 77%) and “how to use and where to get other birth control” (seventh and eighth grades, 46%; ninth and tenth grades, 70%; eleventh and twelfth grades, 70%).<sup>35</sup> Those numbers were confirmed by responses of students in courses described as abstinence-only: 61% reported that their most recent course included “how to use condoms” and 48% reported that the course included “how to use and where to get other birth control.”<sup>36</sup> Thus, it can be inferred that few courses offered in the school context truly have an abstinence-only message.<sup>37</sup> Instead, most courses encompass a broad range of topics.<sup>38</sup> Indeed, a Heritage Foundation study concluded that the government spends twelve dollars to promote contraception for every dollar spent to encourage abstinence.<sup>39</sup>

The popular terminology also masks the ideologies and realities of both approaches. Assuming that some courses do focus primarily on “waiting,” the popular label “abstinence” is unsatisfactory because it overemphasizes what youth may perceive as a negative: the fact that the approach expects young people to *refrain* from sexual activity. Yet,

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and 76% of eleventh and twelfth grade courses. *Id.* The responses of principals were tabulated as 51% for seventh and eighth grade courses, and 63% for ninth to twelfth grade courses. *Id.*

35. *Id.* at 18 tbl. 8.

36. *Id.* at 21 tbl. 11.

37. The 2000 Kaiser Study brings to light a key problem with school-based sex education: the lack of control over what is actually said in the classroom. Close to 60% of principals reported that classroom teachers had substantial freedom regarding the content of sex education classes (with 8% reporting that teachers can “[t]each pretty much what they want” and 50% reporting that teachers have only “some guidelines”). *Id.* at 113. Teachers reported even greater freedom (with 23% reporting that they “[t]each pretty much what [they] want[.]” and 48% reporting having to follow “[s]ome guidelines”). *Id.* at 99.

38. The 2000 Kaiser Study categorized topics as “core” and “other.” See 2000 KAISER STUDY, *supra* note 32, at 18 tbl. 8. Core topics included information about HIV/AIDS and other STIs, the basics of reproduction, and abstinence; other topics include information about birth control, abortion, homosexuality and sexual orientation, how to deal with pressure to have sex, how to use condoms, how to talk with parents about sex, how to use and where to get other birth control, and how to talk with a partner about birth control. *Id.*

39. Melissa G. Pardue et al., *Government Spends \$12 on Safe Sex and Contraceptives for Every \$1 Spent on Abstinence*, BACKGROUNDER, Jan. 14, 2004, at 1, available at [http://s3.amazonaws.com/thf\\_media/2004/pdf/bg1718.pdf](http://s3.amazonaws.com/thf_media/2004/pdf/bg1718.pdf). In President Obama’s 2010 budget, \$75 million was allocated for “teenage pregnancy prevention programs that have been proven through rigorous evaluation.” OFFICE OF MGMT. & BUDGET, *supra* note 1, app. at 490. Contrastingly, the *Washington Post* in March 2010 reported that \$25 million potentially could reach programs encouraging abstinence, but that this amount was enhanced by a provision in the 2010 health care “reform” legislation allowing \$50 million in annual funding for five years to states for abstinence programs. Rob Stein, *Health Bill Restores \$250 Million in Abstinence-Education Funds*, WASH. POST, Mar. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032602457.html>. In contrast, \$75 million a year over five years was added for programs teaching both abstinence and contraception methods. *Id.*

the underlying ideology of the approach is very *positive*. Refraining from sexual activity is the only sure way to protect and safeguard the reproductive health of adolescents. The approach does not just reduce the risk, but eliminates the risks of STIs or pregnancies. Additionally, the abstinence approach is premised on the positive understanding that sexuality is optimally experienced within a caring and committed relationship;<sup>40</sup> it is also based on the positive understanding that human persons are capable of mastering passions, drives, and appetites and, thus, that teens can wait and will derive satisfaction from the fact that they have developed self-mastery.<sup>41</sup> Importantly, although the abstinence approach is often characterized as being associated with (and often attacked for its ties to) some religious groups, the underlying ideology is firmly grounded in classical moral philosophy.<sup>42</sup> More specifically, the ideology recognizes that human intellect and will can empower a person to perform human actions well, i.e., to choose to act in a way that properly integrates reasoning and passions.<sup>43</sup> Philosophers from the time of Aristotle and Aquinas have taught that developing character through cultivation of habits such as temperance and prudence is central to attaining happiness and a good life.<sup>44</sup>

For similar reasons, it is fair to note that the label “comprehensive” masks important aspects of that approach that legitimately may be characterized as negative. First, the popular rhetoric suggests that this approach is more enlightened and informative.<sup>45</sup> Proponents of the comprehensive approach advocate the importance of extensive and medically accurate information.<sup>46</sup> As already noted, however,

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40. MARTIN ET AL., *supra* note 9, at ix, 25–27, 47, 57.

41. See MICHAEL J. HARTWIG, THE POETICS OF INTIMACY & THE PROBLEM OF SEXUAL ABSTINENCE 69–72, 81–82 (2000).

42. *Id.* at 69–73.

43. *Id.* at 69, 78, 81, 83–84.

44. See ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 177, 184 (2d ed. 1984) (analyzing classical moral philosophy in the context of modern society); RALPH MCINERNEY, ETHICA THOMISTICA: THE MORAL PHILOSOPHY OF THOMAS AQUINAS 107–08 (1982) (providing a good introduction to Aristotelean moral philosophy).

45. See, e.g., Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 3, 4–5 (2008) (arguing that abstinence-only education programs have a disproportionate impact on students of color and unconstitutionally deprive those students and others of their right to comprehensive sex education); 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, 1075 (2002) (arguing that Section 510 of the Social Security Act, providing federal funding for abstinence-only education programs, is an unconstitutional violation of the separation of church and state); Schwarz, *supra* note 31, at 117–18 (disparaging abstinence-only education and lauding the comprehensive approach as “necessary”).

46. See, e.g., Schwarz, *supra* note 31, at 117, 129, 132–36 (arguing that abstinence-only programs teach medically inaccurate information).

both approaches in fact offer extensive information, including medical information—and of course any information provided should be accurate. In reality, the key difference is the emphasis placed on information about and exercises involving contraception.<sup>47</sup> Advocates of the comprehensive approach may acknowledge that “waiting is best,” but they do not believe that teens will be able to wait and therefore should “be prepared.”<sup>48</sup> The view that a human person is *incapable* of controlling his or her actions is not positive and, indeed, represents an impoverished view of human nature. Additionally, because the real import of the message is “be prepared,” any notion of genuinely safeguarding the reproductive health of our youth becomes compromised. Sexual activity outside of a lifelong committed relationship always involves a risk of incurring one of the many STIs.<sup>49</sup> So-called “safe-sex” is not really safe, but always presents risks for both persons involved.<sup>50</sup> Labeling “safe-sex” as “being responsible” or as “caring for” the partner is similarly misleading.<sup>51</sup> In reality, using contraception

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47. The Heritage Foundation’s Study of Competing Curricula states that comprehensive programs include exercises demonstrating condom use and practicing condom use, exercises aimed at obtaining condoms, and exercises designed to make condoms “fun,” such as condom races and games. See MARTIN ET AL., *supra* note 9, at 36–38.

48. *Id.* at ix–x. This reason to support “comprehensive” sex education is reflected in the recent shift in recommendations by the Committee on Adolescence of the American Academy of Pediatrics. In earlier years, the Committee’s number one recommendation was abstinence, and the recommendations relating to knowledge and access to contraception were limited to sexually active teens. See, e.g., Comm. on Adolescence, *Adolescent Pregnancy—Current Trends and Issues: 1998*, 103 PEDIATRICS 516, 519 (1999), available at <http://pediatrics.aappublications.org/content/103/2/516.full.pdf+html> (recommending that pediatricians encourage adolescents to abstain from sexual activity). In 2005, the Committee changed its recommendations. See Jonathan D. Klein & Comm. on Adolescence, *Adolescent Pregnancy: Current Trends and Issues*, 116 PEDIATRICS 281, 284 (2005), available at <http://www.pediatricsdigest.mobi/content/116/1/281.full.pdf+html>. Because the evidence presented in the article did not change the medical fact that abstinence is the best practice, the number one recommendation continued to include the need to encourage abstinence. *Id.* The recommendations, however, also called on pediatricians to “[h]elp ensure that all adolescents have knowledge of and access to contraception including barrier methods and emergency contraception supplies.” *Id.*

49. See *Sexually Transmitted Diseases (STDs): Risk Factors*, MAYO CLINIC (Feb. 24, 2011), <http://www.mayoclinic.com/health/sexually-transmitted-diseases-stds/DS01123/DSECTION=risk-factors>.

50. *Id.* (“Anyone who is sexually active risks exposure to a sexually transmitted infection to some degree.”).

51. The phrases “safe sex” and “responsible sexual behavior” are commonly used by advocates of the so-called comprehensive agenda, who claim that

[s]ex education programs that teach only abstinence fail to educate students about responsible sexual behavior and deny students their right of access to important medical information about sex. . . . As a result, teens are engaging in sexual activities without a basic knowledge of contraception, sexually transmitted diseases, safe sex practices, and abortion.

Nat’l Coal. Against Censorship, *Abstinence-Only Sex Education Endangers Students*, in TEEN SEX 104, 104 (Christine Watkins ed., 2005). The attitude that contraception is the



is a means of avoiding responsibility or shifting responsibility to technology.<sup>52</sup> A normal and natural outcome of sexual activity is a new life for which teens are not ready to assume responsibility.<sup>53</sup> Yet, with a “safe-sex” approach, teens engage in sexual activity and a resulting pregnancy is deemed a failure of the contraception.<sup>54</sup> Further, exposing another to significant health risks simply cannot be characterized as “caring.” In his book advocating for more effective sex education, Dr. Richard Wetzel has explained the reality of premature, contraceptive-based sexual activity: “‘Sort of’ safe-sex ‘sort of’ prevents risks for lovers we would ‘sort of’ like to protect.”<sup>55</sup> He continues that “[i]f a couple is having sex without being *fully* responsible, without *fully* protecting each other from the unnecessary, serious risk[s] . . . , then something other than love has highest priority in the relationship.”<sup>56</sup> That other thing which has taken priority is pleasure.<sup>57</sup>

Lastly, the popular rhetoric also fails to identify significant realities associated with both approaches. Although advocates of the comprehensive approach suggest that experimentation with sexuality is normal, natural, and important for sexual health and a satisfying sexual life as an adult,<sup>58</sup> the reality is very different. First, there is no reason to think that sexual experience prior to making a lifelong commitment is crucial to a satisfying sex life. Dr. Wetzel’s straightforward explanation again hits the mark: “sexual intercourse is an inordinately simple act to perform.”<sup>59</sup> Further, the necessary foundation for a satisfying and monogamous sexual relationship as an

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answer is difficult to square with many statistics, including the fact that the majority of women having an abortion were using purportedly highly reliable contraceptives at the time the aborted child was conceived. *See* Cohen, *supra* note 8, at 9.

52. RICHARD WETZEL, *SEXUAL WISDOM: A GUIDE FOR PARENTS, YOUNG ADULTS, EDUCATORS, AND PHYSICIANS* 88 (1988).

53. *See* Manlove, *supra* note 5, at 163.

54. *See* E.S. Williams, Letter, *Contraceptive Failure May Be a Major Factor in Teenage Pregnancy*, 311 *BRIT. MED. J.* 806, 806 (1995), available at <http://www.bmj.com/content/311/7008/806.3.full>.

55. WETZEL, *supra* note 52, at 66.

56. *Id.* at 116.

57. Dr. Wetzel explores in-depth the common misperception that humans have “specific, genital sexual needs.” *Id.* at 3–4. When the idea of “need” is understood as a fallacy, it becomes easy to appreciate that mere desire for pleasure is the underlying motivation for premature sexual activity. Pleasure is, of course, a good thing—but not when it is pursued at the expense of another’s health.

58. *See, e.g.*, SUSAN MOORE & DOREEN ROSENTHAL, *SEXUALITY IN ADOLESCENCE: CURRENT TRENDS 8–9* (2006) (noting that sexual experiences in adolescence provide “opportunities for sexual exploration and discovery, and for acquiring the skills in intimacy which are necessary if one is to establish a long-term partnership”).

59. WETZEL, *supra* note 52, at 23. Wetzel also notes that “surveys indicate that premarital abstinence, not sexual experience, is associated with greater marital sexual satisfaction.” *Id.*



adult is a healthy non-sexual relationship with the partner.<sup>60</sup> Second, when sexual maturity and satisfaction occur within the committed relationship, the bonds of that relationship are strengthened and the couple is able to avoid a key source of later conflict.<sup>61</sup>

Third, engaging in sexual activity before one has made a decision to be committed to a lifelong partner always creates the potential for a *complicated* sex life as an adult.<sup>62</sup> As noted, sexual activity outside of a lifelong committed relationship always involves a risk of incurring one of many STIs.<sup>63</sup> When an STI is incurred, one or both of the persons may be affected for life.<sup>64</sup> Because some STIs remain dormant and ready to infect in later years,<sup>65</sup> an experience with such an STI may mean that the person needs to rely on condoms for life in an effort to protect the other. Other STIs may make it more difficult for a woman to conceive a child in later years, thereby significantly increasing the risk that a couple will be required to use expensive and chemical-laden fertility treatments.<sup>66</sup> Additionally, those who do not have fertility problems—or have not yet discovered the problem—likely will be forced to rely on chemicals and/or barriers as a means of regulating births throughout much of their adult sexual life. Most likely, the resulting choice will be chemical contraceptives that work through the oppression of the woman's natural and healthy reproductive capabilities.<sup>67</sup>

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60. See JOHN VAN EPP, HOW TO AVOID FALLING IN LOVE WITH A JERK: THE FOOLPROOF WAY TO FOLLOW YOUR HEART WITHOUT LOSING YOUR MIND 287, 305 (2008) (citing and discussing years of research confirming that sexual activity by a couple early in the relationship increases the likelihood of later dissatisfaction with the relationship).

61. See *id.* at 305.

62. WETZEL, *supra* note 52, at 17–19 (listing the possible physical and psychological effects of premarital sex).

63. *Id.* at 17.

64. See MOORE & ROSENTHAL, *supra* note 58, at 177; WETZEL, *supra* note 52, at 40, 50–51 (providing statistics about STIs, including the fact that one in five Americans is infected with at least one *incurable* STI).

65. WETZEL, *supra* note 52, at 41–44.

66. See MOORE & ROSENTHAL, *supra* note 58, at 177 (discussing the long-term effects of chlamydia on a woman's fertility).

67. See *Hormonal Birth Control*, COUPLE TO COUPLE LEAGUE, <http://ccli.org/nfp/contraception-sterilization/hormonal-birth-control.php> (last visited Feb. 13, 2012). Hormonal birth control uses artificial estrogen and progestin to alter the natural operation of a woman's reproductive system. *Id.* The hormones typically have three distinct effects: (1) alteration of the natural operation of the pituitary gland, suppressing ovulation during most cycles; (2) thickening of vaginal mucus, making it more difficult for sperm to travel up through the cervix, or disrupting sperm and egg movement through the Fallopian tube; and (3) thinning of the endometrium (inner lining of the uterus) and reducing its blood supply, by depleting it of glycogen, which in turn prevents a blastocyst (a new human being) from being embedded in the uterus. Hormonal birth control is thus both contraceptive and abortifacient. *Id.*

The reality is different for adolescents who adopt an abstinence approach and cultivate self-mastery over sexual desires. By reserving use of sexuality until one has found and made a commitment to a life-long partner, a couple is preserving the potential to have a chemical-free and barrier-free sex life throughout adulthood without undue fear of incurring STIs. The enjoyment and well-being of the other has been safeguarded and maximized. Further, the couple is empowered, if they choose, to regulate births responsibly without resorting to chemicals that oppress a woman's healthy functioning,<sup>68</sup> or to potentially uncomfortable devices or barriers.<sup>69</sup> Because the couple has learned to use their intellect and will to guide sensory perceptions and passions, they are more likely to be empowered to refrain from sexual activity during the relatively short period in each fertility cycle when the woman is actually fertile.<sup>70</sup> Research has confirmed the efficacy of today's natural birth control methods and has shown that the approach enhances many aspects of a couple's relationship.<sup>71</sup> On the flip side, natural methods of birth regulation have also been very effective in helping to achieve a pregnancy in the event fertility issues arise.<sup>72</sup>

Given the inaccuracies and misperceptions associated with the current terminology, the question becomes one of identifying more suitable terminology. The label "comprehensive approach" is not satisfactory because, as this author explains below, both approaches must be comprehensive to be effective. Additionally, the popular label masks the fact that the key message of the comprehensive approach is that teens should begin sexual activity when they are "ready"—as long as they use contraceptives—and, further, may set them up for lifelong dependency on contraceptives.<sup>73</sup> Accordingly, this article drops the label "comprehensive approach," and instead refers to the

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68. See, e.g., *id.* (describing how birth control pills disrupt a woman's natural cycle).

69. See, e.g., *Barrier Methods*, COUPLE TO COUPLE LEAGUE, <http://ccli.org/nfp/contraception-sterilization/barriers.php> (last visited Feb. 13, 2012) (describing contraceptive devices and possible side effects); see also *Overview: Types of Birth Control*, AM. PREGNANCY ASS'N (last updated July 2003), <http://www.americanpregnancy.org/preventing-pregnancy/overviewtypesbirthcontrol.html> (describing the different types of barrier or device methods of contraception).

70. See, e.g., Allen J. Wilcox et al., *The Timing of the "Fertile Window" in the Menstrual Cycle: Day Specific Estimates from a Prospective Study*, 321 BRIT. MED. J. 1259, 1260 (2000), available at <http://www.bmj.com/content/321/7271/1259.full> (explaining that there is a six day window during the average woman's menstrual cycle when that woman may become pregnant from sexual intercourse). At the same time, by virtue of the lifelong commitment, the couple may be in a better position to accept any child that may be conceived. See WETZEL, *supra* note 52, at 24.

71. See WETZEL, *supra* note 52, at 104–05.

72. *Id.* at 103.

73. See MARTIN ET AL., *supra* note 9, at v.

approach as “contraception-based programs.” The “abstinence” label is also unsatisfactory because it overemphasizes the negative—the fact that the approach expects young people to *refrain* from sexual activity—when the key message of the approach is that a lifelong, uncomplicated and satisfying adult sex life is more likely to be achieved if one responsibly *reserves* use of their sexuality.<sup>74</sup> Because the key emphasis is that happiness—the good life of classical moral philosophy—is attainable when intellect is exercised and properly integrates reason with passion,<sup>75</sup> this article uses, instead of “abstinence,” the phrase “intellectual approach” or “intellect-based programs.”<sup>76</sup>

*B. Both Current School-Based Approaches Have Proven to Be Deficient*

Despite the radical difference between the approaches, advocates of both intellect-based and contraception-based programs share one key immediate goal: the objective of helping children and adolescents avoid the significant health risks associated with sexual activity. The risks are many.<sup>77</sup> Physical health risks include STIs, most of which are associated with very significant adverse health consequences,<sup>78</sup> pregnancies, abortions for teens who decide to terminate their pregnancy, and a multitude of significant psychological and other risks.<sup>79</sup> Also, both sides will have difficulty making a strong showing of effectiveness.

The risk of STIs still remains a chief concern, especially because of serious long-term consequences for young women.<sup>80</sup> Recent data suggests that one in four sexually experienced thirteen- to nineteen-year-olds will acquire an STI each year and that approximately three

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74. *See id.*

75. *See* HARTWIG, *supra* note 41, at 69.

76. Notably, Margaret Sanger, the inspirational force behind the Planned Parenthood movement, often used the term “intelligent” when speaking of well-grounded ways of approaching and improving the sexual relationship between loving partners in a lifelong committed relationship. *See* MARGARET SANGER, *MOTHERHOOD IN BONDAGE* 246–47 (Ohio State Univ. Press 2000) (1928).

77. *See* WETZEL, *supra* note 52, at 39–51 (discussing the serious health risks that accompany sexual activity).

78. *See id.* Dr. Wetzel explains that STIs are often considered not to be “a serious problem because they are easy to screen for, diagnose, treat, and cure.” *Id.* at 50. He details the numerous reasons why that viewpoint is a serious misconception. *See id.* at 50–51. Recent CDC statistics confirm that view. *See* DIV. OF STD PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., *SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 2009*, at 1, 85 (2010), available at <http://www.cdc.gov/std/stats09/surv2009-Complete.pdf>.

79. *See* WETZEL, *supra* note 52, at 214–21.

80. *See, e.g.*, MOORE & ROSENTHAL, *supra* note 58, at 177 (explaining that women have a greater risk of long-term health consequences as a result of chlamydia).

million teenagers become infected with an STI each year.<sup>81</sup> Most people are aware of the serious consequences of HIV/AIDs, but far fewer are aware of the significant risks from more common STIs.<sup>82</sup> For example, chlamydia and gonorrhea are two of the most common STIs.<sup>83</sup> Many cases of chlamydia are never documented or reported, because researchers acknowledge that up to 75% of those infected will not be aware of it because the infection is so often asymptomatic.<sup>84</sup> The major syndrome associated with chlamydia is an infection of a woman's upper genital tract, called pelvic inflammatory disease (PID).<sup>85</sup> It has been estimated that one in four women who develop PID suffers serious, long-term health problems.<sup>86</sup> The long-term consequences include infertility (21% of cases) and chronic abdominal pain with painful intercourse (21% of cases).<sup>87</sup> Research has shown that adolescent women are very susceptible to PID.<sup>88</sup> Indeed, the risk of developing PID is ten times greater for a fifteen-year-old girl than for

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81. *Id.* (noting also that studies estimated the “cost of the 9 million new cases of STIs, including HIV, that occurred among 15- to 24-year-olds was a staggering \$6.5 billion.”).

82. See WETZEL, *supra* note 52, at 50–51 (discussing wide-ranging misconceptions about the risks associated with, and the potential severity of, common STIs). More than 50 types of STIs exist and incidence rates are skyrocketing. *Id.* at 40; see also DIV. OF STD PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 78, at 85 tbl. 1 (showing a national summary of the number of cases of STIs reported by state health departments from 1941–2009). It was estimated that 12 million new cases were experienced each year and that one in five Americans were infected with at least one incurable STI. WETZEL, *supra* note 52, at 40.

83. See DIV. OF STD PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 78, at 1–2. In 2009, a total of 1,244,180 chlamydial infections were reported to the CDC in 50 states and the District of Columbia, which was an increase of 2.8% from 2008. *Id.* at 1. In 2009, a total of 301,174 cases of gonorrhea were reported in the United States. *Id.* at 2.

84. MOORE & ROSENTHAL, *supra* note 58, at 177.

85. *Id.*

86. *Pelvic Inflammatory Disease (PID)*, N.Y. STATE DEP'T OF HEALTH: INFO. FOR A HEALTHY N.Y., <http://www.health.ny.gov/diseases/communicable/std/pid.htm> (last updated Nov. 2006) (listing complications that include infertility, ectopic pregnancy, and chronic pelvic pain).

87. WETZEL, *supra* note 52, at 41. PID, which is associated with other STIs as well, is responsible for one third of the estimated two million cases of infertility each year. *Id.* It is also the leading cause of maternal death in the first trimester of pregnancy. *Id.* PID is also a cause of both ectopic and tubal pregnancies. *Id.*; see also Willard Cates, Jr. et al., *Pelvic Inflammatory Disease and Tubal Infertility: The Preventable Conditions*, 709 ANNALS N.Y. ACAD. SCI., 179–81 (1994) (evaluating relationships among STDs, PID, and infertility); Masood A. Khatamee, *Infertility: A Preventable Epidemic?*, 33 INT'L J. FERTILITY 246, 247–48 (1988) (discussing the effect of PID on infertility and evaluating the economic impact of infertility). Unfortunately diagnosis is difficult. See WETZEL, *supra* note 52, at 41. Tests exist for chlamydia and gonorrhea, but produce false negatives 30% of the time. *Id.* Further, many persons infected have no symptoms and thus are not tested and often infect others. *Id.*; Francine Grodstein & Kenneth J. Rothman, *Epidemiology of Pelvic Inflammatory Disease*, 5 EPIDEMIOLOGY 234, 234 (1994) (analyzing the distribution and determinants of PID).

88. See MOORE & ROSENTHAL, *supra* note 58, at 178.

a twenty-four-year-old woman,<sup>89</sup> and an adolescent woman relying on certain “safe-sex” practices is especially vulnerable.<sup>90</sup>

Other common STIs include genital herpes simplex and genital warts.<sup>91</sup> Both have serious consequences, especially for young women.<sup>92</sup> Genital herpes, which also may be asymptomatic and has been reported as affecting as much as 15% of the population, can be transmitted from mother to infant if the infection is present during birth.<sup>93</sup> Venereal or genital warts, which are experienced by 32–46% of sexually active teenagers, are associated with cancer, especially cervical cancer in women.<sup>94</sup> There is also considerable evidence that being infected with one STI makes an individual more susceptible to HIV infection.<sup>95</sup>

Adolescent pregnancies, of course, also remain a concern, and there is also a growing concern about the number of abortions experienced by teens and young adults.<sup>96</sup> In 1998, teen pregnancies in the United States were estimated to number 900,000 per year, and the number of teens giving birth was reported to be about 500,000 each year.<sup>97</sup> The reasons for continued high numbers of teen pregnancies

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89. *Id.*

90. *Pelvic Inflammatory Disease (PID)*, MAYO CLINIC (May 24, 2011), <http://www.mayoclinic.com/health/pelvicinflammatorydisease/DS00402/DSECTION=complications> (stating that a contraceptive intrauterine device (IUD) may increase a woman's risk of PID, while barrier methods and birth control pills can reduce a woman's risk of PID). The Mayo Clinic's summary of PID lists risk factors as: being a sexually active woman younger than 25 years old; having multiple partners; and using IUDs or a form of non-barrier contraceptives. *Id.* As a non-barrier contraceptive method, the pill can be a risk factor for PID. However, the Fact Sheet summary also explains that the pill “may offer some protection against the development of PID by causing [the] body to create thicker cervical mucus, making it more difficult for bacteria to reach [the] upper genital tract.” *Id.* The Fact Sheet summary also confirms the link to infertility: “PID may damage your reproductive organs and cause infertility—the inability to become pregnant after one year of unprotected sex. The more times you've had PID, the greater your risk of infertility. Delaying treatment for PID also dramatically increases your risk of infertility.” *Id.*

91. MOORE & ROSENTHAL, *supra* note 58, at 178.

92. *See id.*

93. *Id.*

94. WETZEL, *supra* note 52, at 44. Merck & Co., Inc. has developed a vaccine, Gardasil, that it has marketed as a “safe and effective” preventative measure against cervical cancer resulting from four strains of the sexually transmitted Human Papillomavirus (HPV). Joan Robinson & Steven W. Mosher, *Merck Researcher Admits: Gardasil Guards Against Almost Nothing*, POPULATION RES. INST. (Oct. 15, 2009), <http://www.pop.org/content/merck-researcher-admits-gardasil-guards-against-almost-nothing-985>. Merck and others have strongly argued that all young girls should receive the vaccine. *Id.* However, many factors are emerging that greatly temper the pharmaceutical company's claims. *Id.* Serious side effects exist, and the protection is potentially short-lived. *Id.*

95. MOORE & ROSENTHAL, *supra* note 58, at 178.

96. *See* Belinda Luscombe, *New Data: Teen Pregnancy, Abortion on the Rise*, TIME (Jan. 26, 2010), <http://www.time.com/time/health/article/0,8599,1956645,00.html>.

97. MOORE & ROSENTHAL, *supra* note 58, at 195–96. Teens who have a baby have complicated their lives, as economic and educational challenges are common consequences.



are many, but researchers continue to confirm a link to low economic status.<sup>98</sup> The number of abortions by teens almost doubled between 1974 and 1980, and has remained somewhat constant since that time.<sup>99</sup> Research shows that, consistently, younger teenagers have been more likely to undergo an abortion than older teens.<sup>100</sup> Research also suggests that young women who undergo abortions are more likely to suffer cervical trauma than older women, “which in turn may have long-term negative implications for future conception and pregnancy outcomes.”<sup>101</sup> Thus, again, fertility loss is showing up as a significant risk associated with premature sexual activity by adolescents.

Significant psychological risks are also recognized. Based on his in-depth research and experiences in treating men and women with a variety of sexual-related problems and concerns, Dr. Wetzel has identified the following psychological risks associated with premature use of sexuality: loss of self-esteem (from, for example, concerns about motivations); resentment (from, for example, being used or from acquiring a STI or from the inconvenience of an unwanted pregnancy); fear of physical risks (such as STIs); guilt (from, for example, knowing that one is not ready to care for a child that may be conceived); loss of intimacy (since sexual activity often replaces intimacy that could grow and develop from other activities); embarrassment (from, for example, public knowledge of the relationship or of a resulting STI); distrust (from, for example, the knowledge that the other is willing to put the person at risk of serious harm); and stunted growth in personal identity and social skills (since, for example, premarital sex often leads to undue emphasis on physical aspects of a relationship, or prevents opportunities for improving oneself academically, spiritually, athletically, or socially, etc.).<sup>102</sup>

The psychological risks associated with premature sexual activity are a serious concern.<sup>103</sup> The risks are, however, discounted by most

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*Id.* at 209–10. But Moore and Rosenthal report that recent studies have reinforced that pregnancy and status as mother are not the key predictors of future challenges; key predictors are, rather, contextual factors such as socioeconomic status and social support. *Id.* at 209; see also Patricia Donovan, *Falling Teen Pregnancy, Birthrate: What's Behind the Declines?*, 1 GUTTMACHER REP. ON PUB. POL'Y 6, 6 (Oct. 1998), available at <http://www.guttmacher.org/pubs/tgr/01/5/gr010506.pdf>.

98. MOORE & ROSENTHAL, *supra* note 58, at 197–98.

99. *Id.* at 203.

100. *Id.* (citing studies in South Australia, where 83% of pregnancies in thirteen-year-olds ended in abortion compared with 47% of those aged nineteen years; and in the UK, where in 2005, 56% of thirteen to sixteen-year-olds ended their pregnancy compared with 40% of fifteen to nineteen-year-olds).

101. *Id.* at 204 (citations omitted).

102. WETZEL, *supra* note 52, at 17–18.

103. See, e.g., MOORE & ROSENTHAL, *supra* note 58, at 216 (explaining that premature (“ill-timed”) sexual activity, may be “detrimental to the psychological, emotional and social well-being of the adolescent”).



mainstream sex education experts.<sup>104</sup> The mainstream experts merely assume that these risks can be eliminated with “proper” sex education.<sup>105</sup> That is, a major component of the contraception-based approach is to make teens comfortable with premature sexual activity, such that they do not experience the emotions and feelings that teens ordinarily would experience.<sup>106</sup> In the early years of developing approaches to sex education, mainstream experts acknowledged that the ordinary psychological development of adolescents rendered them unprepared to deal effectively with the emotional and psychological issues that accompany sexual activity.<sup>107</sup> The experts recognized that a choice had to be made: design sex education programs that empower teens to refrain from sexual activity as adolescents or design programs that immerse teens in sexuality (by repeatedly having them talk about sexual activity and think about sexual activity) so that, when adolescents do engage in sexual activity, they will have been conditioned regarding emotional and psychological issues.<sup>108</sup> As exhibited by the curricular content advocated by mainstream sex education experts, these experts chose the latter route. While that choice arguably may have been somewhat rational at the time, given the then-limited concerns about STIs and expectations relating to emerging contraceptives, the very serious health risks that are known today seriously undermine the continuing rationality of that approach.

Without doubt, then, premature sexual activity is associated with many serious risks, both physical and psychological.<sup>109</sup> With a shift to tying funding decisions to evidence of success, proponents of both

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104. See, e.g., WETZEL, *supra* note 52, at 220–21 (noting that most sex education courses promote the same contraception-based approach as health care providers, without discussing the effect of premarital sex on teens’ self-esteem).

105. See *id.* at 221 (explaining that contraception is promoted for “safe sex” and disease prevention).

106. MARTIN ET AL., *supra* note 9, at x.

107. See, e.g., William A. Fisher, *Adolescent Contraception: Summary and Recommendations*, in ADOLESCENTS, SEX, AND CONTRACEPTION 273, 274 (Donn Byrne & William A. Fisher eds., 1983) (explaining that psychosexual maturity—“the ability to think about one’s sexuality in an objective and rational manner”—is “a major task of the adolescent years,” and that teens engaging in sexual activity often are not capable of the sort of rational thought required for the responsible decision making involved in using contraception (quoting George Cvetkovich & Barbara Grote, *Adolescent Development and Teenage Fertility*, in ADOLESCENTS, SEX, AND CONTRACEPTION, *supra*, at 109, 110)).

108. See *id.* at 282–83 (presenting two approaches of dealing with psychosexual immaturity: (1) encouraging teens to “postpone intercourse until they are older,” or (2) “design[ing] interventions that . . . hasten psychosexual maturation,” including exercises that make teens comfortable with sexuality and accepting of their “sexual nature”).

109. See Christine C. Kim & Robert Rector, *Evidence on the Effectiveness of Abstinence Education: An Update*, BACKGROUND, Feb. 19, 2010, at 1, available at <http://www.heritage.org/research/reports/2010/02/evidence-on-the-effectiveness-of-abstinence-education-an-update> (detailing the health risks faced by sexually active teenagers).

intellect-based and contraception-based sex education curricula will strive to identify empirical studies and statistics that purportedly support their cause by showing some reduction in the known risks.<sup>110</sup> However, careful reflection suggests that both current approaches to school-based sex education suffer from deficiencies when considered in light of meeting the goal of helping children and adolescents avoid the significant risks associated with sexual activity.

Logically, an intellect-based approach would seem to be the most promising. As noted, the health risks undeniably associated with sexual activity by adolescents are very serious.<sup>111</sup> Further, the likelihood of experiencing an adverse consequence for a person initiating sexual activity during adolescence is exceedingly high.<sup>112</sup> Accordingly, providing information that would motivate adolescents to refrain from sexual activity, and helping to solidify their capability to refrain (i.e., their will power), clearly would seem to constitute the most effective means of safeguarding their reproductive health.<sup>113</sup> Moreover, the intellectual approach would help youth avoid the significant adverse health consequences associated with use of many artificial contraceptives<sup>114</sup>—risks that the contraceptive-based approaches largely ignore.

Statistics exist showing that intellect-based programs have been somewhat successful. For example, an article in the February 2010 issue of *Archives of Pediatrics and Adolescent Medicine* reports that African-American sixth and seventh graders who completed a so-called “abstinence-based” program were less likely to start having sex within the next two years than students who participated in a contraceptive-based program (32.6% versus 51.8%, respectively).<sup>115</sup> Another highly publicized study reported in 2009 showed that teens who made virginity pledges (and thus for whom the abstinence message was central) formed part of a group that had significant delay in the initiation of sexual activity (the average age being twenty-one years,<sup>116</sup> as opposed to the current national average of seventeen

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110. See *New Sex Ed Funding Ends Abstinence-Only Strategy*, CBSNEWS (Oct. 1, 2010, 8:31 AM), <http://www.cbsnews.com/stories/2010/10/01/health/main6917985.shtml>.

111. See Kim & Rector, *supra* note 109, at 1.

112. See, e.g., *CDC Press Release*, *supra* note 2 (noting the high incidence rate of STDs in adolescent girls).

113. See, e.g., WETZEL, *supra* note 52, at 227 (reviewing the positive results in pregnancy reduction with multifaceted approaches, including promoting abstinence, communication and “family unity”).

114. See, e.g., *supra* note 90 and accompanying text (discussing the possible connection between IUDs and the risk of PID, as well as the correlation between PID and infertility).

115. John B. Jemmott III et al., *Efficacy of a Theory-Based Abstinence-Only Intervention Over 24 Months: A Randomized Controlled Trial With Young Adolescents*, 164 ARCHIVES PEDIATRIC & ADOLESCENT MED. 152, 156 tbl. 2 (2010).

116. See Janet Elise Rosenbaum, *Patient Teenagers? A Comparison of the Sexual Behavior of Virginity Pledgers and Matched Nonpledgers*, 123 PEDIATRICS e110, e114 (2009), available at <http://pediatrics.aappublications.org/content/123/1/e110.full.pdf+html>.

years<sup>117</sup>). Additionally, the Heritage Foundation published in 2010 a review of research studies of a number of specific so-called “abstinence-based” courses:<sup>118</sup> “Sixteen studies examined abstinence programs that were intended primarily to teach abstinence. Of these 16 studies, 12 reported positive findings. The other six studies analyzed virginity pledges, and of these six studies, five reported positive findings.”<sup>119</sup> Overall, the review found that “17 of the 22 studies reported statistically significant positive results, such as delayed sexual initiation and reduced levels of early sexual activity, among youths who have received abstinence education.”<sup>120</sup> In 2007, the Institute for Research and Evaluation published a report summarizing its work spanning over fifteen years and including over 100 evaluations of “abstinence” education in thirty states.<sup>121</sup> The Institute concluded that “[w]ell-designed and well-implemented” programs were effective in reducing “teen sexual activity by as much as one half for periods of one to two years,” thereby “substantially increasing the number of adolescents who avoid the full range of problems related to teen sexual activity.”<sup>122</sup>

Admittedly, the statistics also show that the success of intellect-based programs is not sufficiently robust.<sup>123</sup> In all of the studies just noted, a certain percentage of youth reported that, despite participation in the course, they had sexual intercourse.<sup>124</sup> Notably, however, given the increasingly prevalent—and seemingly rampant—messages

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The study did not find a significant difference in the age of initiation between pledgers and non-pledgers, but states that the two groups were “closely matched,” “using factors including prepledge religiosity and attitudes toward sex and birth control.” *Id.* at e110.

117. See *In Brief: Facts on American Teens’ Sexual and Reproductive Health*, GUTTMACHER INST. (Dec. 2011), <http://www.guttmacher.org/pubs/FB-ATSRH.html>.

118. Kim & Rector, *supra* note 109, at 2 (detailing the review of twenty-two studies of abstinence education programs).

119. *Id.*

120. *Id.*

121. INST. FOR RESEARCH & EVALUATION, “ABSTINENCE” OR “COMPREHENSIVE” SEX EDUCATION? 1 (2007).

122. *Id.* at 6. In 2008, Stan E. Weed, Ph.D., director of the Institute for Research and Evaluation, provided an in-depth report detailing how to properly evaluate abstinence programs, along with the Institute’s conclusions, to a congressional committee. STAN E. WEED, TESTIMONY BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (Apr. 23, 2008), *available at* <http://www.freeteensusa.org/080423DrWeed%20Testmny.pdf>. Researchers have also pointed to the success in Uganda, which has promoted an abstinence approach in its fight against HIV/AIDS. Uganda is the only African nation to have embraced this approach to the epidemic, and it is also the only country in sub-Saharan African to have substantially decreased its population’s incidence of HIV/AIDS. WETZEL, *supra* note 52, at 56–57.

123. See, e.g., Rosenbaum, *supra* note 116, at e114 (noting that virginity pledgers do not have a lower age of sexual initiation or a lower average number of lifetime partners as compared to non-pledgers).

124. See, e.g., *id.* at e113 tbl. 2 (detailing findings from a study relating to sexual activity for individuals who take a virginity pledge as compared to non-pledgers).

promoting lifestyles other than “abstinence” or “one love for life,” it is not unreasonable to assert that any statistics *not* showing an *increase* in sexual activity or STIs or teen pregnancies is evidence that intellect-based programs have some real level of effectiveness.<sup>125</sup> Nonetheless, given the gravity of the risks to the reproductive health of adolescents, it is fair to acknowledge that a greater level of success must be achieved.

Importantly, however, statistics do not suggest that contraception-based sex education programs offered in schools have had any greater success. Critics of intellect-based programs often point to a Mathematica Policy Research report released in 2007 that compared the behavior of students in abstinence programs with that of students in contraceptive-based programs.<sup>126</sup> The data revealed that, by the end of the study, when the average child was almost seventeen years old, half of both groups had remained abstinent; sexually active teens in both groups initiated sex at about fifteen years; and more than a third of both groups had two or more partners.<sup>127</sup> Critics sometimes use this data to argue that intellect-based programs have failed.<sup>128</sup> However, as pointed out by the Institute for Research and Evaluation, the data equally shows that the contraceptive-based programs failed.<sup>129</sup> Moreover, the Institute for Research and Evaluation also explained that when studies are held to the same testing criteria as the Mathematica evaluation (involving random assignment, intermittent follow-ups, and high-level success criteria), “there is ample evidence that condom-based sex education interventions do not work.”<sup>130</sup>

Additionally, the premise underlying contraception-based programs—that increasing utilization of condoms and other contraceptives will minimize the incidence of negative consequences—has

125. And, indeed, CDC has reported that “[p]regnancy rates declined for teenagers through 2004[,] reaching historic lows.” See Ventura et al., *supra* note 3, at 4.

126. See CHRISTOPHER TRENHOLM ET AL., MATHEMATICA POLICY RESEARCH INC., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS: FINAL REPORT xiii (2007), <http://mathematica-mpr.net/publications/pdfs/impactabstinence.pdf>.

127. *Id.* at xvii–xix fig. 3.

128. See Laura Sessions Stepp, *Study Casts Doubt on Abstinence-Only Programs*, WASH. POST, Apr. 14, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041301003.html> (“Abstinence-only was an experiment and it failed.” (quoting Martha Kempner of the Sexuality Information and Education Council)).

129. See INST. FOR RESEARCH AND EVALUATION, *supra* note 121, at 3 (explaining that the Mathematica Study “cannot be generalized to represent the efficacy” of abstinence or comprehensive sex education); see also Laurie Higgins, *Abstinence Education Works*, ILL. FAM. INST. (Feb. 9, 2010, 9:57 PM), <http://www.illinoisfamily.org/dsa/contentview.asp?c=34751> (“I would argue that if abstinence programs are deemed a failure and worthy of defunding, then comprehensive sex ed programs, which in some studies have virtually the same results, should also be deemed a failure and defunded.”).

130. See INST. FOR RESEARCH & EVALUATION, *supra* note 121, at 3.

been refuted. In addition to other evaluations cited in its report, the Institute for Research and Evaluation explains the findings of a landmark review of 112 peer-review studies covering twenty years of research on sex education:

[N]o school-based CSE [contraceptive-based sex education] programs were shown to increase the number of teens who used condoms consistently, for more than a 3-month time period. No school-based CSE programs demonstrated a decrease in teen pregnancy or STD rates for any subgroup for any period of time. . . . [O]nly three programs increased frequency of condom use (but not *consistent* use) for the same time period.<sup>131</sup>

The Institute concludes that the scientific evidence “does not support abandoning the abstinence approach in favor of a [contraception/condom-based] strategy that has not been proven to be successful after twenty years of study.”<sup>132</sup>

Researchers in other countries have more affirmatively concluded that contraceptive-based programs are not working. Canadian researchers recently studied more than two dozen earlier trials of sex education efforts that targeted teens and concluded that, overall, *none* had made a dent in the rate of sexual activity by teens.<sup>133</sup> Additionally, a study published in the *British Medical Journal* in 2009 reports that an intensive, multicomponent youth development program for teens aged thirteen to fifteen at entry, which included sex education offering advice on accessing family planning services, was not only *not* successful, but also resulted in higher rates of sexual activity and pregnancies.<sup>134</sup> Specifically, women in the intervention group more commonly reported early sexual activity (58% versus 38%) and pregnancy (16% versus 6%).<sup>135</sup> Although the researchers try to minimize the importance of the findings,<sup>136</sup> the study supports

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131. INST. FOR RESEARCH & EVALUATION, ANOTHER LOOK AT THE EVIDENCE: ABSTINENCE AND COMPREHENSIVE SEX EDUCATION IN AMERICA'S SCHOOLS 1 (2009), [http://institute-research.com/docs/Another\\_Look\\_at\\_the\\_Evidence\\_%28IRE,\\_10-16-09%29.pdf](http://institute-research.com/docs/Another_Look_at_the_Evidence_%28IRE,_10-16-09%29.pdf) (internal citations omitted).

132. *Id.* at 2.

133. Alba DiCenso et al., *Interventions to Reduce Unintended Pregnancies Among Adolescents: Systematic Review of Randomized Controlled Trials*, 324 *BRIT. MED. J.* 1426, 1426 (2002).

134. See Meg Wiggins et al., *Health Outcomes of Youth Development Programme in England: Prospective Matched Comparison Study*, 339 *BRIT. MED. J.* (2009).

135. *Id.*

136. The report notes that “[t]he unexpected sexual health outcomes are unlikely to be attributable to the sex education . . . because this was a relatively small and variably delivered component and because of the lack of previous evidence for harms arising from sex education.” *Id.* at 6. The study included, however, 2,724 youth between the ages of 13 and 15. *Id.* at 1.



the growing debate in England about the role of the government in sex education. Laura Donnelly, health correspondent for the *Telegraph*, reported that, despite contraceptive-based sex education and readily accessible contraception, the government had failed to achieve established benchmarks.<sup>137</sup> In 1999, the British government committed to cutting the teenage pregnancy rate in half by 2010;<sup>138</sup> instead, the numbers and percentages of pregnancies and abortions have increased.<sup>139</sup> Donnelly reported that the shadow health secretary acknowledged that research suggests that “the Government’s failure was rooted in an attempt to find ‘state-led solutions’ to problems that need to be tackled by families.”<sup>140</sup>

Moreover, although proponents of contraception-based programs claim that their approach does not increase the amount or quantity of sexual activity of adolescents, statistics can be found pointing in both directions.<sup>141</sup> Thus, because both approaches to sex education in the school setting have demonstrated significant shortcomings, policy makers serious about attaining the goal of safeguarding adolescent reproductive health must broaden their perspective. More specifically, the contemporary assumption that a school-based approach is appropriate and can be effective must be reassessed, and States should be open to exploring the critical question of whether to shift to a parent-centered approach.

### *C. Data Suggests That Parents Hold the Key to Effectively Influencing Teens*

Reassessing the appropriateness of a school-based approach to family life education is crucial because existing data also strongly suggests that a parent-centered approach may be the best way to address the situation.<sup>142</sup> Foremost, a strong majority of teens have reported in surveys that they are concerned about their parents’

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137. Laura Donnelly, *Sex Education Failing to Halt Teen Pregnancy*, TELEGRAPH (London), Dec. 30, 2007, <http://www.telegraph.co.uk/news/uknews/1574043/Sex-education-failing-to-halt-teen-pregnancy.html>.

138. *Id.*

139. *Id.*

140. *Id.* (“What we actually need is for family-led organisations, and local communities and the voluntary sector to work together on these problems.” (quoting shadow health secretary, Andrew Langley)).

141. See WETZEL, *supra* note 52, at 221; see also A.R. Allgeier, *Informational Barriers to Contraception*, in ADOLESCENTS, SEX, AND CONTRACEPTION, *supra* note 107, at 143, 158 (noting that, although unanimity does not exist in the studies, “it is safe to conclude that formal sex instruction can change attitudes about sexuality, and when this occurs, it is in a more permissive or tolerant direction”).

142. See MOORE & ROSENTHAL, *supra* note 58, at 99 (outlining programs for parents to discuss sexual activity with their teenagers).



reaction to matters relating to sexuality.<sup>143</sup> For example, a 2002 Kaiser Family Foundation survey of fifteen- to seventeen-year-old youth explored the extent to which parents and teens communicated about sexual health matters.<sup>144</sup> A bare majority reported that certain significant discussions occurred,<sup>145</sup> but 83% reported that they may not discuss sexual issues with their parents because they are worried about their parents' reaction.<sup>146</sup> Further, 80% reported that they may not discuss issues because they worried that parents might think they were going to engage in sexual activity.<sup>147</sup> Although the survey questions did not rigorously probe the underlying reason for the "worry," it is certainly legitimate to think that these numbers strongly suggest that teens are concerned because they value their parents' opinion of them.<sup>148</sup> Human nature is such that adolescents want their parents to love and approve of them.<sup>149</sup> That basic human sentiment suggests that, if parents actually carried out their responsibilities relating to education and formation, a strong majority of children would respond positively and try to act consistently with the views expressed by their parents.<sup>150</sup> This proposition is reinforced by other research showing that adolescents who reported feeling connected to parents and family were more likely than others to delay initiating sexual activity and, conversely, that youth who reported feeling a lack of parental love or caring were also more likely to report sexual-risk behaviors.<sup>151</sup>

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143. See HENRY J. KAISER FAMILY FOUND., VIRGINITY AND THE FIRST TIME: A SERIES OF NATIONAL SURVEYS OF TEENS ABOUT SEX 3–4 figs. 3 & 5 (2003) [hereinafter VIRGINITY AND THE FIRST TIME].

144. HENRY J. KAISER FAMILY FOUND., A SERIES OF NATIONAL SURVEYS OF TEENS ABOUT SEX: COMMUNICATION (2002), available at <http://www.kff.org/entpartnerships/upload/Teens-and-Sexual-Health-Communication-Toplines-Survey.pdf>.

145. *Id.* at Q1. Fifty-one percent reported they had discussed "how to know when you are ready to have sex"; 52% had discussed condoms (50% of males and 54% of females); 56% had discussed HIV/AIDS, and 50% had discussed other STIs. *Id.*

146. *Id.* at Q4.

147. *Id.*

148. Other questions in a similar series of surveys asked teens who had not had sex whether a variety of factors had an influence on the decision. One factor was "because of what your parents taught you about sex." See VIRGINITY AND THE FIRST TIME, *supra* note 143, at 4 fig. 5. Ninety-one percent of teens answered that they personally agreed that this factor influenced the decision. *Id.*

149. See, e.g., LOIS CLARK, OHIO STATE UNIV. EXTENSION, RAISING RESPONSIBLE YOUTH 1 (2009), <http://ohioline.osu.edu/flm02/pdf/FS10.pdf> (noting the importance of parental love and acceptance during adolescence).

150. Researchers on both sides of the debate recognized that parents could have a very significant role. Moore and Rosenthal note that the psychological literature strongly shows that parents can have a "profound influence . . . on the lives of their children." MOORE & ROSENTHAL, *supra* note 58, at 92. They also state: "There is no question that young people take notice of their parents' attitudes and guidance about sexuality, even if it is only to rebel." *Id.* at 91.

151. See Christine C. Kim, *Teen Sex: The Parent Factor*, BACKGROUNDER, Oct. 7, 2008, at 7–8 (citing numerous studies confirming the positive impact parents can have in helping

Additional data from a 2003 Kaiser survey similarly supports the conclusion that shifting to a parent-centered approach may be the key to reversing the trends of the last few decades. Responses to this survey suggest that parents underestimate the extent to which they *could* make a difference. First, although 75% of parents of thirteen- to seventeen-year-old youth reported that, in their opinion, the media (television, movies, magazines and the internet) was very influential to their teens as to matters relating to relationships and sexual health,<sup>152</sup> only 35% of teens characterized the media's influence in the same way.<sup>153</sup> Parents also overestimated the influence of friends: 73% of parents reported that, in their opinion, teens learn "a lot" from their friends.<sup>154</sup> Yet only 45% of teens reported that they learn "a lot" from friends.<sup>155</sup> Parents were also out of sync with teens in terms of the influence of parents and sex education classes. Most teens (57%) reported that they learned "a lot" from their sex education classes; only 39% reported that they learned "a lot" from their parents.<sup>156</sup> In contrast, only 32% of parents thought teens learned "a lot" in sex education classes, and 68% thought teens learned "a lot" from parents.<sup>157</sup> Parents, then, are confused regarding both the extent to which they are actually providing information and influence, and how influential they could be if they made a greater effort.

Importantly, parents also have available another important tool for helping their children in this area. The Kaiser data shows that, of adolescent girls aged fifteen to nineteen who describe their first sexual experience as voluntary, 73% reported that their first sexual partner was someone with whom they were "going steady."<sup>158</sup> Only 20% reported that the encounter was with a friend or someone they occasionally dated.<sup>159</sup> That type of strong link between "going

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their children delay sexual activity); Michael D. Resnick et al., *Protecting Adolescents from Harm: Findings from the National Longitudinal Study on Adolescent Health*, 278 JAMA 823, 830 (1997); see also Laurence Steinberg, *We Know Some Things: Parent-Adolescent Relationships in Retrospect and Prospect*, 11 J. RES. ON ADOLESCENCE 1, 8 (2001) (discussing that authoritative homes tend to produce children who are less likely to engage in risky or antisocial behavior, including delinquency and drug use).

152. TINA HOFF ET AL., HENRY J. KAISER FAMILY FOUND., NATIONAL SURVEY OF ADOLESCENTS AND YOUNG ADULTS: SEXUAL HEALTH KNOWLEDGE, ATTITUDES AND EXPERIENCES 48–49 (2003) [hereinafter 2003 KAISER SURVEY] (stating that 68% percent of parents reported that teens learn "a lot" from parents; 72% percent reported that teens learn "a lot" from the media).

153. *See id.* at 55.

154. *See id.* at 48.

155. *See id.* at 55.

156. *See id.* at 55–56.

157. *See id.* at 48.

158. *Fact Sheet: Teen Sexual Activity*, HENRY J. KAISER FAMILY FOUND., 1 (Dec. 2002), <http://www.kff.org/youth/hivstds/upload/Teen-Sexual-Activity-Fact-Sheet.pdf>.

159. *Id.*

steady” and premature sexual activity has been found in a number of studies.<sup>160</sup> At the same time, 67% of teens reported having been alone with a boyfriend or girlfriend in an intimate situation.<sup>161</sup> Based on statistics such as these, some have advocated that parents can greatly safeguard their children’s well-being by affirmatively stressing the importance of friendship over dating experiences—and especially over the idea of “going steady”;<sup>162</sup> and stressing or requiring group activities in public places over activities that result in segregation and privacy.<sup>163</sup> Teens often report that they did not plan or intend the sexual experience, but that the circumstances were such that things just happened.<sup>164</sup> Importantly, such parental control does not have to be “commanding,” which of course could be counterproductive. Rather, discussions between parents and teens about sexual activity and the importance of refraining in order to preserve the potential for an optimal adult sex life could lead to an agreement that allows parents and teens to work together to achieve the common objective: namely the objective of safeguarding the child’s reproductive health by helping teens avoid being in circumstances where intimacy could occur which could lead to unplanned sexual activity.

The 2000 Kaiser Study data showed that, although many parents purportedly were in favor of a broad range of information being provided to their children in sex education courses, 97% of parents report that the core message they want conveyed to their children is that of “waiting to have sex.”<sup>165</sup> Further, other surveys have revealed that of teens aged fifteen to seventeen who have *not* had sexual intercourse, 74% report that they had not because they “made a conscious decision to wait.”<sup>166</sup> Thus, again, *if* parents made a genuine effort in the arena of sex education—i.e., if they had repeated discussions at appropriate

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160. See, e.g., MOORE & ROSENTHAL, *supra* note 58, at 9 (discussing the connection between teenage dating and teenage sexual activity).

161. 2000 KAISER STUDY, *supra* note 32, at 74. *But see* 2003 KAISER SURVEY, *supra* note 152, at 75 (reporting that 56% of teens disclosed having been “with someone in an intimate or sexual way”).

162. See RICHARD WETZEL, SEXUAL WISDOM FOR CATHOLIC ADOLESCENTS: A HOME-BASED, COMPREHENSIVE COURSE FOR OLDER TEENS 167 (2009); Steve Wood, *Passing on the Faith to Teens—Part II of Fathering Teens on the Eve of the Third Millennium*, FAM. LIFE CENTER INT’L: FAITH & FAM., <http://www.familylifecenter.net/article.asp?artId=120> (last visited Feb. 13, 2012).

163. See WETZEL, *supra* note 162, at 167; Wood, *supra* note 162.

164. See VIRGINITY AND THE FIRST TIME, *supra* note 143, at 3 (reporting that 57% of teens answered that it is more common for the first sexual experience of teens to be unplanned).

165. See 2000 KAISER STUDY, *supra* note 32, at 31 tbl. 23.

166. See *Fact Sheet: Teen Sexual Activity*, *supra* note 158, at 1; see also VIRGINITY AND THE FIRST TIME, *supra* note 143, at 2 fig. 2 (noting that of the teens who had not had sexual intercourse, 42% answered “I am waiting to have sex until I am in a committed relationship,” and 37% answered “I am waiting to have sex until I am married”).

times and in an appropriate manner, presented convincing reasons supporting their conviction that children should wait, and helped their children to develop necessary skills such as temperance-based habits and to avoid situations where intimate activity is possible—it is reasonable to think that children would, in fact, be more likely to wait.

Unfortunately, most parents have *not* made an affirmative and/or concerted effort to direct and control the sex education of their children.<sup>167</sup> As noted, only 39% of youth report that they learned “a lot” about relationships and sexual health from their parents.<sup>168</sup> Instead, parents are relying on schools to provide the information. At the same time, although parents report being satisfied with the sex education courses offered to their children, the data shows that many actually know very little about what is being taught in those courses.<sup>169</sup> In the 2000 Kaiser Study, only 39% of principals reported inviting parents to attend orientation sessions about sex education classes, and, when offered, 73% of parents reported that *no one* from the family attended.<sup>170</sup> When parents were asked whether the school sent them a description of the curriculum for sex education courses explaining topics to be covered, over one-half of the parents said “no” or that they “did not know.”<sup>171</sup> When asked how much confidence they had that the courses taught attitudes or values similar to those taught at home, only 27% of the parents reported being very confident.<sup>172</sup> Despite this lack of knowledge, parents also seem to express strong support for sex education courses in schools and support for a broad range of topics to be covered.<sup>173</sup>

The reasons for parental support of school-based sex education have not been adequately explored.<sup>174</sup> For many, it is likely just a

167. See 2003 KAISER SURVEY, *supra* note 152, at 55.

168. *Id.*

169. 2000 KAISER STUDY, *supra* note 32, at 79 (showing that 18% of parents did not know whether their child’s sexual education classes covered the basics of pregnancy and birth, while 27% did not know whether the courses covered methods of preventing pregnancy).

170. *Id.* at 23 tbl. 14, 78 (citing information reported by principals and information reported by parents respectively).

171. *Id.* at 78.

172. *Id.* at 80.

173. See *Sex Education in America: An NPR/Kaiser/Kennedy School Poll*, NPR (Feb. 24, 2004), <http://www.npr.org/templates/story/story.php?storyId=1622610> [hereinafter *NPR Poll*] (“[O]nly 7% of Americans say sex education should not be taught in schools.”). Interestingly enough, this was not a question asked in the Kaiser study. See 2000 KAISER STUDY, *supra* note 32, at 31, 76 (demonstrating that most parents reported satisfaction with the sex education their children were receiving in school and that most parents desired that a broad range of sexual education topics be covered).

174. See, e.g., MARTIN ET AL., *supra* note 9, at 59 (explaining the theory that parents overwhelmingly favor the positive message in abstinence programs and therefore the reason why parents promote school-based sex education is because parents wrongly assume that programs labeled “comprehensive” emphasize abstinence).

matter of it being easier to leave the task to the schools. However, to the extent this is true, it may be attributable to the fact that the movement to get sex education into the schools included a propaganda campaign designed to minimize the importance of parental influence.<sup>175</sup> As explained in greater detail below, ideological movements with substantial influence in the 1960s and 1970s began a concerted effort to push aside the influence of parents and to maximize the importance of sex education “experts,” experts who have a tendency to think and say that parents cannot do a good job in the area of sex education.<sup>176</sup> Further, as two-income families have become the norm over the last few decades,<sup>177</sup> precious family time has been stretched thin.<sup>178</sup> As Michelle Obama has gently explained, parents who love their children have wrongly allowed them to adopt lifestyles promoting obesity.<sup>179</sup> Similarly, parents who love their children have wrongly allowed mainstream experts in sex education to usurp a role for which parents logically are the most qualified. Thus, although a press release for another Kaiser survey boldly proclaims that “[t]he debate over whether to have sex education in American schools is over,”<sup>180</sup> it is valid, logical and imperative to assert just the opposite: that the debate must begin again, this time properly framed.

## II. PRINCIPLES OF LAW AND POLICY POINT TO A PARENT-CENTERED APPROACH

Education of children generally involves both parents and the community. In the United States in particular, public education was perceived as instrumental to the success of a democratic government.<sup>181</sup> Meaningful citizen participation in the formulation of government policies requires a certain baseline of knowledge upon which to

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175. See *infra* notes 443–58 and accompanying text.

176. See MOORE & ROSENTHAL, *supra* note 58, at 92 (noting that while “[m]ost parents are not trained as educators, let alone as biologists, sex educators and psychologists . . . many feel that it is important that at least some sex education comes from the home . . .”).

177. See ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE 7 (2003) (explaining the trend for both parents to enter into the work force in order to provide for their children).

178. See *id.* at 7–8.

179. See Nanci Hellmich, *Michelle Obama to Launch Initiative Fighting Child Obesity*, USA TODAY (Jan. 20, 2010, 6:23 PM), [http://www.usatoday.com/news/health/weightloss/2010-01-20-michelle-obama-obesity\\_N.htm](http://www.usatoday.com/news/health/weightloss/2010-01-20-michelle-obama-obesity_N.htm) (discussing Michelle Obama’s assertion that families’ hectic lifestyles can lead to unhealthy eating habits).

180. See NPR Poll, *supra* note 173.

181. See ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 111–12 (1919) (positing that providing public education is one of the duties of a free government in order to improve and cultivate the “intellectual energies of the whole”).

draw.<sup>182</sup> Community operated school systems emerged to teach children reading, writing, and math, along with other subjects deemed important to the formation of good citizens.<sup>183</sup> Schools, then, especially public schools in the United States, have been viewed as tools for mass education and, as such, tools also for inculcation of values.<sup>184</sup> Yet parents have been recognized as having a natural and inalienable right and duty relating to the education of children.<sup>185</sup> Accordingly, a delicate balance must be struck between parental rights and State interests in education. This part of the article analyzes key principles underlying parental rights in an effort to help assess whether a school-based approach to education relating to sexuality can be justified. Because education in sexuality is inextricably intertwined with a family's cultural and moral outlook, and because private, gradual and individualized education is most appropriate and effective, the analysis concludes that State intrusion into the realm of education in sexuality and family life is unwarranted.

*A. Supreme Court Pronouncements: Parents Have a Natural and Inalienable Right to Control a Child's Education in the Realm of Moral Standards and Religious Beliefs*

Recognition of a parental right to direct the education and upbringing of children has a long history in the United States. Although the source and contours of the right have been inadequately explored, the United States Supreme Court has characterized the right as fundamental. Understanding the essence of the right requires a brief review of key Supreme Court decisions.

*1. The Parental Right is "Established Beyond Debate"*

The scope of the parental right to control and direct the education of their children was first explored by the Supreme Court in 1923 in *Meyer v. Nebraska*.<sup>186</sup> At issue in *Meyer* was a state law which precluded a person from teaching any subject in public or private schools

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182. *E.g., id.* (explaining that in order for citizens to actively participate in the political process, they must be enlightened and intelligent).

183. *See id.* at 215 (describing the development of school systems in America).

184. *See id.* at 313 ("The purpose of education . . . was to prepare men to live properly in organized society, and hence the chief aim in education was not . . . mere knowledge, nor personal mental power, but personal character and social morality.").

185. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 518 (1925) ("It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent.").

186. *See Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).



in any language other than English.<sup>187</sup> The law was challenged as an impermissible infringement on important liberty interests protected by the Due Process Clause: the interests of persons to follow their calling to teach foreign languages, the interests of parents in engaging such persons to teach their children, and the interests of children in acquiring an education.<sup>188</sup> The Court recognized the existence of each of these rights from the perspective of a protectable liberty interest.<sup>189</sup> Regarding the parental interest, the Court stated: “Corresponding to the right of control, it is the natural duty of the parent to give his children [a suitable] education . . . ; and nearly all the States . . . enforce this obligation by compulsory laws.”<sup>190</sup> The Court struck down the law as an unwarranted interference with the liberty interests at issue.<sup>191</sup>

The parental right was confirmed two years later in *Pierce v. Society of the Sisters*, which involved a challenge to a state law requiring every parent or other person having control or charge or custody of children between the ages of eight and sixteen years to send them to public school.<sup>192</sup> The schools operated by appellees, the Society of Sisters and Hill Military Academy, taught the subjects usually accessible in public schools, but also provided systematic religious instruction and moral training and military training respectively.<sup>193</sup> The Court in *Pierce* reiterated that

[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction

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187. *Id.* at 400–01 (explaining that the state supreme court had clarified that the statute at issue did not proscribe use of the “ancient or dead languages,” such as Latin, Greek and Hebrew, but clearly did ban teaching in alien languages such as German, French, Spanish, and Italian).

188. *Id.* at 399–400 (explaining that the central question was whether the challenged law violated important liberty interests protected by the Due Process Clause of the Fourteenth Amendment).

189. *Id.* at 399. The Court sets forth the following oft-quoted language:

While this Court has not attempted to define with exactness the liberty thus guaranteed [by the Due Process Clause], . . . [w]ithout doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.*

190. *Id.* at 400.

191. *Id.* at 400–01 (stating that the law in question interfered with a parent’s ability to have access to teachers capable of teaching technical aspects of foreign languages and stating further that “[p]ractically, education of the young is only possible in schools conducted by especially qualified persons . . .”).

192. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530–31 (1925).

193. *Id.* at 531–33.

from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>194</sup>

The Court noted that the private schools were not harmful to the public, that they provide a suitable education, and that no circumstances or emergencies existed that might warrant “extraordinary measures relative to primary education.”<sup>195</sup> The Court thus held that, plainly, the law “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>196</sup>

In two later important Supreme Court decisions, the parental right relating to education and upbringing was heightened or magnified by judicial concerns relating to religious freedom. In *Prince v. Massachusetts*, the Court upheld state enforcement of child labor laws as applied to a young girl offering Jehovah Witnesses’ materials on a public street with her legal custodian.<sup>197</sup> Mrs. Prince, the young girl’s aunt and guardian, earnestly believed that she and the girl had a religious duty to preach the Gospel through public distribution of the materials.<sup>198</sup> Importantly, although the Court rejected the idea that freedom of religion protections were stronger than freedom of press protections,<sup>199</sup> the Court expressly affirmed that religious implications of the parental right made a difference: “The parent’s conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters.”<sup>200</sup> The Court in *Prince* then articulated a vision of the parental right arguably more expansive than the vision acknowledged in *Meyer* and *Pierce*:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.<sup>201</sup>

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194. *Id.* at 535.

195. *Id.* at 534.

196. *Id.* at 534–35.

197. *Prince v. Massachusetts*, 321 U.S. 158, 159–60, 170 (1944).

198. *Id.* at 162–63.

199. *Id.* at 164 (“[I]t may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme.”).

200. *Id.* at 165.

201. *Id.* at 166 (internal citation omitted).

In *Meyer* and *Pierce*, the emphasis was on a parental right to provide education beyond and different from that provided by the state school.<sup>202</sup> In *Prince*, the Court spoke in terms of the parental right reserving or preserving certain subject areas of parental control, thereby delimiting State encroachment into those realms absent a significant and legitimate state interest.<sup>203</sup>

*Wisconsin v. Yoder* similarly involved a challenge grounded in the parental right to control and to direct the education of children, as heightened by the right to freedom of religion.<sup>204</sup> In *Yoder*, parents who were members of the Old Order Amish religion challenged a state law requiring their children's attendance at a public or private school until age sixteen.<sup>205</sup> In accord with the tenets of the Old Order Amish communities, the parents sincerely believed that attendance at a high school, whether public or private, was significantly contrary to the Amish religion and way of life, which required living in a church community "separate and apart from the world and worldly influence."<sup>206</sup> The Court in *Yoder* acknowledged the "high responsibility" of the state for the education of its citizens, noting that providing a public education "ranks at the very apex of the function of a State."<sup>207</sup> Yet the Court at the same time reiterated that the "values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."<sup>208</sup> According to the Court, the State's interest in universal education cannot infringe on "the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations.'"<sup>209</sup>

The Court in *Yoder* then explained that the "additional obligations" aspect of the parental duty "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship"<sup>210</sup> and that, when the traditional parental right to control the religious upbringing of their children is at stake, a state law would

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202. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 518 (1925) (striking down a law requiring public schooling and affirming the right of parents to place their children in private schools); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (explaining that a natural duty of a parent is to give his or her children an education appropriate for that specific child).

203. See *Prince*, 321 U.S. at 169–70.

204. See *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972).

205. *Id.* at 207–09.

206. *Id.* at 210–12 (explaining that the Amish are not opposed to formal elementary school education, and sometimes use public elementary schools but, after eighth grade, Amish children must be in an environment fostering manual work, self-reliance and skills necessary for their adult roles, as well as growth in their faith and their relationship with the Amish community).

207. *Id.* at 213.

208. *Id.* at 213–14.

209. *Id.* at 214 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925)).

210. *Yoder*, 406 U.S. at 233 (internal quotation marks omitted).

be upheld only upon a heightened showing by the state.<sup>211</sup> The Court in *Yoder* thus affirmed—in the special context of state education—that, as to certain subject matter, parental rights and duties relating to education are prior to state rights and responsibilities.<sup>212</sup>

More recently, in *Troxel v. Granville*,<sup>213</sup> the Justices of the Supreme Court strongly reiterated the fundamental nature of the parental right relating to the upbringing of children.<sup>214</sup> After *Yoder*, some lower courts narrowly construed the parental right to control and direct the education of their children.<sup>215</sup> Additionally, the basic but more general parental right to the custody and care of children had been impacted by, e.g., state recognition of an independent third party's interest in a child. For example, *Troxel* involved a challenge to a State nonparental visitation statute which allowed courts to interfere with parental rights without a showing of harm and based only on a judicial finding relating to the best interests of the child.<sup>216</sup> In making the finding, courts were not required to give any deference to a parent's decision about the best interest of the child.<sup>217</sup> The Supreme Court in *Troxel* found the state scheme problematic.<sup>218</sup> As is reflected in the plurality, concurring and dissenting opinions, all of the Justices in *Troxel* reaffirmed the fundamental nature of parental rights.<sup>219</sup> The plurality opinion affirmed and reiterated the key points of the cases just discussed, and emphasized that, in light of this precedent, the Due Process Clause of the Fourteenth Amendment protects “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>220</sup>

211. *Id.* at 233.

212. *Id.* at 221. The law at issue in *Yoder* did not pass muster. The Court found that the state requirement had a severe impact on the practice of the Amish religion, and that the state interest in education was not sufficiently strong given that the Amish practices ensure that children or adults leaving the community have skills and habits that generally would prevent them from being a burden to society. *Id.* at 211–12, 218, 224–25.

213. 530 U.S. 57 (2000).

214. *Id.* at 57, 65–66.

215. See, e.g., *Parker v. Hurley*, 514 F.3d 87, 102–03, 107 (1st Cir. 2008) (holding that the substantive Due Process Clause does not give parents absolute control over what types of materials their children are exposed to in public schools); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 419 F. Supp. 2d 937, 945 (E.D. Ky. 2006) (stating that parents “do not have a right generally to direct *how* a public school teaches their child” (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)), *rev'd on other grounds*, 507 F.3d 494 (6th Cir. 2007)).

216. *Troxel*, 530 U.S. at 57 (discussing section 26.10.160(3) of the Revised Code of Washington).

217. *Id.* at 67 (noting that the statutory scheme placed the decision “solely in the hands of the judge”).

218. *Id.* at 69–70, 72–73.

219. *Id.* at 72, 77, 80, 86–87, 91, 95.

220. *Id.* at 66. The plurality stated:

More than 75 years ago, in *Meyer* . . . we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home

In a dissenting opinion, Justice Scalia used even stronger terms in characterizing the parental right. The parental right, he explains, is “among the ‘unalienable Rights’ with which the Declaration of Independence proclaims ‘all men . . . are endowed by their Creator’” and is thus a right which governmental authorities have *no power* to infringe upon.<sup>221</sup> Although such rights are, in Scalia’s view, unenforceable by the judiciary, nonetheless it would be “entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents’ authority over the rearing of their children . . . .”<sup>222</sup>

The fractured opinion in *Troxel* reflects a lack of clarity regarding the source and precise contours of the parental right, but the historical and enduring fact of its existence and fundamental nature are certain.

## 2. *The Right Renders Certain Matters Beyond the Competency of Public Education*

Important points flow from the Supreme Court cases. The Court in *Meyer* understood the parental right as giving rise to a natural duty: that having responsibility for children and educating them are inextricably intertwined.<sup>223</sup> In *Pierce*, the Supreme Court emphasized

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and bring up children” and “to control the education of their own.” Two years later in *Pierce* . . . , we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” We explained in *Pierce* that “. . . those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” . . . “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” . . . “It is plain that the interest of a parent . . . ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’” . . . “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents . . . is now established beyond debate as an enduring American tradition.”

*Id.* at 65–66 (internal citations omitted).

See also *id.* at 77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 88 (Stevens, J., dissenting) (noting, *inter alia*, that the parental interest is a function “not simply of . . . biology and intimate connection, but of the broader and apparently independent interest in family”); *id.* at 95–96 (Kennedy, J., dissenting) (noting that *Pierce* and *Meyer*, “had they been decided in recent times,” may have grounded the parental right in First Amendment principles, and opining that courts should use restraint in further defining the right).

221. *Id.* at 91 (Scalia, J., dissenting).

222. *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting).

223. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

the elevated nature of the duty.<sup>224</sup> The parental duty relating to education is distinct from and primary to the state interest in education.<sup>225</sup> Indeed, the Court in *Meyer* noted that state compulsory education laws constitute, in part, state enforcement of the parent's important and natural duty to provide an appropriate education.<sup>226</sup> *Prince* and *Yoder* reiterate the elevated nature of the parental right and duty, and view it as reserving for parental control certain subject matters deemed beyond the competency of state education generally.<sup>227</sup> The Court in *Pierce*, *Prince*, and *Yoder* explained that the parental duty must be read as including education relating to "additional obligations,"<sup>228</sup> of which "the state can neither supply nor hinder."<sup>229</sup> The Court in *Yoder* emphasized that this aspect of the parental right must be understood as "includ[ing] the inculcation of moral standards [and] religious beliefs."<sup>230</sup> The opinions in *Troxel* reiterate the fundamental and inalienable nature of the right, its priority over rights of the state, and a concomitant limitation on state action infringing on the right.<sup>231</sup> The decisions collectively acknowledge that the parental right is not absolute, but strongly espouse the general sentiment that any state interference must be justified and the more specific sentiment that the state interest in universal education does not insulate state education programs from serious scrutiny—meaning heightened scrutiny—when the parental right is implicated.

*B. The Principle of Subsidiarity: Unwarranted State Assumption of Parental Duties as to Education Impedes Effective Allocation of Societal Obligations*

As highlighted in the foregoing analysis, the Supreme Court's view that certain aspects of a child's upbringing are reserved to a private realm within the control of parents stems from the notion that the state is not the appropriate body or entity to prepare children for certain types of obligations, including "additional obligations" that stem from moral standards and religious beliefs which "the state can neither supply nor hinder."<sup>232</sup> Stated more generally, striking the

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224. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

225. *Id.*

226. *Meyer*, 262 U.S. at 400.

227. *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).

228. *Yoder*, 406 U.S. at 214 (quoting *Pierce*, 268 U.S. at 535).

229. *Prince*, 321 U.S. at 166 (citing *Pierce*, 268 U.S. at 510).

230. *Yoder*, 406 U.S. at 233.

231. *Troxel v. Granville*, 530 U.S. 57, 65–66, 72, 77, 80, 86–87, 91, 95 (2000).

232. *Yoder*, 406 U.S. at 214 (quoting *Pierce*, 268 U.S. at 535); *Prince*, 321 U.S. at 166 (citing *Pierce*, 268 U.S. at 510).



right balance between parental rights and state interests in education is tied to the subject matter or content involved.

The notion that the subject matter at issue has implications for the appropriate allocation of authority within society is a bedrock principle of jurisprudence, especially in the United States.<sup>233</sup> A federal system of government is one in which a constitution allocates political authority “between a central government and the governments of the constituent states, . . . each acting within its own constitutional sphere.”<sup>234</sup> Although a federal government is supreme when acting within its sphere, the federal government generally respects the traditional authority of the states over certain matters, for example, the health and welfare of persons residing in the state.<sup>235</sup> Although not an inherent aspect of the concept of federalism, federal respect for state authority in areas of state competency can be seen in a variety of decisions by Congress to allow a concurrent state exercise of authority in many regulatory schemes.<sup>236</sup> It is also illustrated by executive orders requiring federal agencies to carefully consider federalism implications of new rules and to justify any federal encroachments on state authority.<sup>237</sup> This country’s long-standing practice of federal comity for state authority constitutes, in essence, recognition of the principle of subsidiarity.<sup>238</sup>

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233. See Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 104–07 (2001).

234. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 403–04 (1994).

235. Notably, Supreme Court rulings have clarified that federal respect does not create a legally enforceable right for states. Rather, federal exercise of its authority is limited primarily via the political process. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (rejecting the category of “traditional government function[s]” as an unworkable one (internal quotation marks omitted)); see also *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654–55 (1995); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

236. See Bermann, *supra* note 234, at 407–08.

237. For example, welfare and environmental statutes often allow states to establish their own standards as long as they are consistent with federal standards and subject to federal oversight. See *Occupational Safety and Health Act*, 29 U.S.C. §§ 651, 672 (1970); *Clean Water Act*, 33 U.S.C. § 1251(b) (1987). Similarly, Spending Clause enactments often allow states to create welfare programs wherein the state sets, for example, the standard of need and other aspects of the program, as long as certain overarching federal standards satisfied. See Bermann, *supra* note 234, at 415; *About TANF*, ADMIN. FOR CHILD. & FAMILIES, U.S. DEPT. OF HEALTH & HUM. SERVICES., <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last updated Dec. 7, 2011) (explaining that the federal Temporary Assistance for Needy Families (TANF) program grants states “wide flexibility to develop and implement their own welfare programs”). The federal funding for sex education programs falls into this category.

238. See Bermann, *supra* note 234, at 414–16; see also *id.* at 436–45 (discussing Executive Orders’ bearing on federalism and subsidiarity). Bermann nonetheless concludes that “while there are growing misgivings in the United States about leaving the

Although the principle of subsidiarity is rarely expressly invoked in policy making in the United States, it has been noted that “the principle is deeply ingrained in the structure of our federal system” and that “[i]t would be hard to think of a more American principle of social structure . . . .”<sup>239</sup> The principle, which has gained express recognition in the context of European federalism,<sup>240</sup> is grounded in classical philosophy and has its express roots in Catholic social theory.<sup>241</sup> Scholars cite as the origin of the principle the encyclical *Quadragesimo Anno* (*On the Reconstruction of the Social Order*), issued by Pope Pius XI in 1931.<sup>242</sup> *Quadragesimo Anno* addressed, in part, the need for State reform in light of expanding social-welfare types of legislation.<sup>243</sup> *Quadragesimo Anno* was written forty years after the revolutionary encyclical *Rerum Novarum* (*On Capital and Labor*) issued by Pope Leo XIII in 1891, which addressed the concerns of the poor working class stemming from emerging industrialism.<sup>244</sup> *Rerum Novarum* emphasized that government is not “a mere guardian of law and of good order,” but also must work to see that laws and institutions promote public and individual well-being; and that, in “watch[ing] over the community and its parts [and] protecting private individuals in their rights, chief consideration ought to be given to the weak and the poor.”<sup>245</sup> As a result of *Rerum Novarum*, new laws were enacted pertaining to “the protection of life, health, strength, family, homes, workshops, wages and labor hazards, . . . with special concern for women and children”;<sup>246</sup> and numerous

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state of federalism entirely to an unstructured political process, no real attempt has been made to ensure respect for subsidiarity as such, either as a jurisdictional or a procedural principle.” *Id.* at 337.

239. See Vischer, *supra* note 233, at 126 (quoting Fred Crosson, *Catholic Social Teaching and American Society*, in *PRINCIPLES OF CATHOLIC SOCIAL TEACHING* 165, 171 (David A. Boileau ed., 1998) (alteration in original) (internal quotation marks omitted)).

240. See Bermann, *supra* note 234, at 333–34 (noting that the principle has dominated discussions of European federalism).

241. See *id.* at 339; see also Joshua P. Hochschild, *The Principle of Subsidiarity and the Agrarian Ideal*, in *FAITH, MORALITY, AND CIVIL SOCIETY* 37, 37 (Dale McConkey & Peter Augustine Lawler eds., 2003).

242. See, e.g., Bermann, *supra* note 234, at 339 (noting that supporters of subsidiarity in Europe trace the concept to *Quadragesimo Anno*); Vischer, *supra* note 233, at 109 (citing *Quadragesimo Anno* when discussing the creation of subsidiarity).

243. Pope Pius XI, *Quadragesimo Anno*, ¶¶ 27–28, 78, 80 (1931), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html).

244. Pope Leo XIII, *Rerum Novarum* ¶¶ 1, 2 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html).

245. Pope Pius XI, *supra* note 243, ¶ 25 (explaining the ideas expressed by Pope Leo XIII).

246. *Id.* ¶ 28.

workers' associations emerged.<sup>247</sup> In *Quadragesimo Anno*, Pius XI defended and further developed the teachings set forth in *Rerum Novarum*, explaining and highlighting perceived errors encountered in both socialism and capitalism.<sup>248</sup>

Because both documents urged a more expansive view of governmental responsibility, or State responsibility, for ensuring equitable treatment of the working class,<sup>249</sup> Pius XI also understood the importance of addressing the reform of the State itself, which ran the risk of being overwhelmed by almost infinite tasks and duties. What is today referred to as the principle of subsidiarity emerged from the discussion in *Quadragesimo Anno* regarding the importance of careful attention to the proper allocation of responsibilities between the State and societal institutions within the State.

As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. *For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.*

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly.

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247. *See id.* ¶ 33.

248. *See id.* ¶¶ 108–121. Regarding capitalism, Pope Pius XI noted:

With all his energy Leo XIII sought to adjust this economic system according to the norms of right order; hence, it is evident that this system is not to be condemned in itself. And surely it is not of its own nature vicious. But it does violate right order when capital hires workers, that is, the non-owning working class, with a view to and under such terms that it directs business and even the whole economic system according to its own will and advantage, scorning the human dignity of the workers, the social character of economic activity and social justice itself, and the common good.

*Id.* ¶ 101.

249. In addressing the needs of the working poor, *Rerum Novarum* distinguished between the right of property and its use, noting the role of the state in ensuring that property is used for the common good; taught that a person's superfluous income likewise could and should be used for the betterment of the common good; and called for a more equitable sharing of wealth between laborers and holders of capital. *See id.* ¶¶ 47–51, 53–54. *Quadragesimo Anno* reiterated the importance of distributing created goods in conformity with the norms of the common good and social justice and expressed the need for a wage "sufficient to support [the worker] and his family," but with due consideration being given to the viability of businesses and the public economic good. *Id.* ¶¶ 54–73.

Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function,” the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.<sup>250</sup>

The principle of subsidiarity thus encompasses a twofold message. First, in order to be effective, the State must carefully discern which tasks it undertakes, focusing on matters of importance to which the State alone has the competency to attend.<sup>251</sup> Second, the State has a duty to enable its members to become as self-sufficient as possible, and thus should not, without good reason, assume functions that individuals or small units of society can perform.<sup>252</sup> It is this second aspect of the doctrine, in particular, that has long been reflected in American political theory. Indeed, it has been pointed out that Abraham Lincoln’s political philosophy readily comports with subsidiarity.<sup>253</sup> For example, Lincoln stated that:

[T]he legitimate object of government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do for themselves in their separate and individual capacities. In all that people can individually do as well for themselves, government ought not to interfere.<sup>254</sup>

A key underlying premise is that, by careful attention to the competency and dignity of smaller units of society when allocating functions and responsibilities, a State more readily promotes the happiness and well-being of its members.<sup>255</sup> Lincoln’s point thus coincides with

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250. *Id.* ¶¶ 79–80 (emphasis added).

251. *See* Bermann, *supra* note 234, at 334.

252. *See* BENEDICT M. ASHLEY & KEVIN D. O’ROURKE, *ETHICS OF HEALTH CARE: AN INTRODUCTORY TEXTBOOK* 92–93 (3d ed. 2002). Ashley and O’Rourke explain subsidiarity as follows:

Subsidiarity implies that the first responsibility to meet human needs rests with the free and competent individual, then with the local group. Higher and higher levels of the community must assume this responsibility (1) when the lower unit cannot assume it and (2) when the lower unit neglects to assume it. The higher level should never be content merely to take over responsibility, but it must work to return responsibility to a lower level.

*Id.* at 92.

253. Vischer, *supra* note 233, at 125.

254. *Id.* (citing Michael Novak, *Seven Tangled Questions*, in *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 132, 140 (Michael Novak ed., 2d ed. 1996)).

255. ASHLEY & O’ROURKE, *supra* note 252, at 93.

*Quadragesimo Anno*, that it is demeaning and gravely wrong when the State usurps tasks that individuals can accomplish by their own initiative and industry.<sup>256</sup> At the same time, observing the principle of subsidiarity empowers the State to focus more effectively on and do those tasks that “belong to it alone because it alone can do them.”<sup>257</sup>

As noted, the principle of subsidiarity is grounded, in part, in classical political philosophy.<sup>258</sup> In classical philosophy, the *polis* emerged as the conceptual ideal in terms of the organizational structure for society.<sup>259</sup> Central features of the *polis* include the citizen body, centralized governmental institutions dependent upon vibrant citizen participation, and just and nonarbitrary laws.<sup>260</sup> A key innovation of the classical *polis* was the shift away from absolute rule to a government structure that provided a vehicle for the voice of the people.<sup>261</sup> Further, at the heart of the *polis* concept is the duty of citizens to participate in the political institutions of the *polis*.<sup>262</sup> In a well-functioning *polis*, the citizens had a voice, and exercise of that voice helped ensure enactment of just laws promoting the maintenance and furtherance of society.<sup>263</sup> In a well-functioning *polis*, then, the government and its laws worked for and built up the people.<sup>264</sup> From Aristotle’s perspective, this meant that the *polis* exists for the “good life”; i.e., while “[i]n other types of state the people existed for the well-being of the state, . . . in [the Greek city-state] the state existed for the well-being of its people.”<sup>265</sup> Thus, a central function of the state is to help humans attain their proper end—*eudaimonia*, or happiness.<sup>266</sup>

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256. See Pope Pius XI, *supra* note 243, ¶¶ 78–79.

257. See *id.* ¶ 80.

258. See Hochschild, *supra* note 241, at 37. The principle also flows logically from a view of the common good as “the sum total of those conditions of social living whereby citizens are enabled more fully and more readily to achieve their own perfection.” ASHLEY & O’ROURKE, *supra* note 252, at 91.

259. See MOGENS HERMAN HANSEN, *POLIS: AN INTRODUCTION TO THE ANCIENT GREEK CITY-STATE* 122 (2006).

260. See *id.* at 64.

261. See *id.* at 12 (noting that, although few were truly democratic, many city-states maintained a republican form of government).

262. See *id.* at 110; see also GEOFFREY PARKER, *SOVEREIGN CITY: THE CITY-STATE THROUGH HISTORY* 45 (2004).

263. See PARKER, *supra* note 262, at 34.

264. See *id.* at 46 (noting that the *polis* liberated humanity in a manner that was unknown in the East).

265. *Id.* at 34.

266. See MCINERNEY, *supra* note 44, at 15. Importantly, happiness in classical philosophy was understood as a state resulting from a lifetime of performing human actions well, i.e., of performing acts to achieve true goods and not merely apparent goods. See *id.* at 14. Humans can more readily choose true goods if their decision-making is guided by reason, virtues, and the “mean” established by the wise or prudent individual. See *id.* at 15. Philosophers have traditionally understood that the State exists to help humans make good

The principle of subsidiarity builds upon that classical understanding of the State. A State's attention to the dignity and competency of smaller societal units will foster a stronger and more effective social authority and a happier and more industrious citizenry.<sup>267</sup> On the other hand, inattention to these matters impedes prudent and effective allocation of societal obligations.<sup>268</sup>

*C. As a Matter of Law and Policy, Parental Rights and Duties Readily Encompass Education in Sexuality and Family Life*

In key respects, the principle of subsidiarity reinforces the Supreme Court's understanding of a natural and inalienable parental right relating to the control, education, and formation of children. Further, both strongly point to the appropriateness of a parent-centered approach to education in sexuality. Beginning with the Court's decision in *Meyer*, the parental right has been grounded in a natural right to attend to the education and formation of children.<sup>269</sup> The principle of subsidiarity reinforces the understanding that the family has inalienable rights relating to education. Indeed, prior to the encyclical *Quadragesimo Anno* issued in 1931, Pope Pius XI specifically addressed the issue of education in the encyclical *Divini Illius Magistri (On Christian Education)* in 1929.<sup>270</sup> *Divini Illius Magistri* does not expressly invoke the principle of subsidiarity, but nonetheless clearly places the family's rights relating to education above the rights of the state.<sup>271</sup> Pius posits that the parental right to education is a natural right flowing from principles inherently associated with the family: namely, the principle of life and education to life flowing from fecundity, and the principle of order flowing from the authority of parents over their children.<sup>272</sup> The important role of civil society in education is recognized, but Pope Pius XI explains that

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decisions about voluntary actions, because only in that way can humans attain the true good. *Id.* at 14–15.

267. See ASHLEY & O'ROURKE, *supra* note 252, at 93.

268. See PARKER, *supra* note 262, at 45 (implying that a lack of democratic participation by the whole citizenry was a structural and functional problem that could have broad repercussions).

269. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

270. Pope Pius XI, *Divini Illius Magistri (Christian Education of Youth)*, in SEVEN GREAT ENCYCLICALS 37, 43 (1963).

271. See *id.* at 45 (asserting that God communicates directly with the family which shares the Catholic Church's mission of education). Pius explains that the State exists to promote peace and security for families and individuals, allowing for the free exercise of rights and the pursuit of spiritual and temporal well-being through coordination of the work of all. *Id.* at 48. It is thus the duty of the state to protect the prior rights of the family regarding education and to respect the rights of the Church. See *id.*

272. See *id.* at 45.



the State's role cannot infringe on the rights of the family or the Church relating to education.<sup>273</sup> Rather, the State

should begin by encouraging and assisting . . . the initiative and activity of the Church and the family, whose successes in [the field of education] have been clearly demonstrated by history and experience. It should moreover supplement their work whenever this falls short of what is necessary, even by means of its own schools and institutions.<sup>274</sup>

As to education generally, the principle of subsidiarity and Supreme Court precedent therefore cast the State's role as supplemental to the role and prior right of parents.

The question becomes, then, whether the sphere preserved by the parental right to educate their children extends to education relating to sexuality. Again, both Supreme Court precedent and the principle of subsidiarity strongly point to an affirmative answer. The Court has repeatedly explained the right and duty in terms of education relating to "additional obligations,"<sup>275</sup> which "the state can neither supply nor hinder."<sup>276</sup> The Court in *Yoder* emphasized that this aspect of the parental right must be understood as including the inculcation of values and moral standards, especially those stemming from religious convictions or beliefs.<sup>277</sup> The Court's understanding of the right thus encompasses education relating to sexuality to the extent that effective education in sexuality vitally depends on the inculcation of values, moral standards, and beliefs.<sup>278</sup>

From the perspective of subsidiarity, state assumption of aspects of the responsibility for educating children is appropriately delimited by what is necessary; i.e., state or public education should be restricted to subject matter and experiences which parents and family cannot provide.<sup>279</sup> Today, the appropriate sphere of public education is broad. Many, perhaps most, parents and families are inadequately prepared to provide a solid middle-school or high-school level education in traditional school subjects: math, reading, the sciences,

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273. *See id.* at 43. The encyclical constituted, in large part, a defense of Christian education. As such, Pius explains and asserts a key role for the Church in education: because every form of instruction has a necessary connection with the human person's last end, the Pope also claims for the Church an inalienable right and indispensable duty to watch over the entire education of her children. *Id.*

274. *Id.* at 49.

275. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (internal quotation marks omitted).

276. *Troxel v. Granville*, 530 U.S. 56, 66 (2000) (internal quotation marks omitted).

277. *See Yoder*, 406 U.S. at 233.

278. *See id.* As discussed in the following subsection, advocates on both sides of the debate agree that inculcation of values is the key to effective education in sexuality. *See infra* Part II.C.1.

279. ASHLEY & O'ROURKE, *supra* note 252, at 24.

technology, etc.<sup>280</sup> Schools also arguably provide experiences that may not be readily replicable in a home-school environment.<sup>281</sup>

Common sense and logic, however, dictate that the appropriate sphere of public education does not encompass education in sexuality. Given the subject matter at issue—information relating to sexuality and family life—parents and family clearly should be deemed competent to be teachers. To be sure, parents and family may need assistance of varying types to effectively accomplish the task. Some parents may be hesitant to engage in discussions relating to sexuality and need encouragement and support. Others may need help in identifying information and developing the reasons supporting the message they want to impart. But, in a proper application of the principle of subsidiarity, needing assistance does not warrant state assumption of the responsibility. Rather, as emphasized by ethicists Ashley and O'Rourke, subsidiarity implies that the first responsibility to meet human needs rests with the free and competent individual, then with the local group.<sup>282</sup> Higher and higher levels of the community should assume this responsibility only when the lower unit cannot assume it or neglects to assume it.<sup>283</sup> Further, and most importantly, “[t]he higher level should never be content merely to take over responsibility,” but rather “must work to return responsibility to a lower level.”<sup>284</sup>

Principles of law and policy therefore point to the appropriateness of a parent-centered approach to education in sexuality, an approach that mandates only a carefully delimited role for the schools. This conclusion, however, is based on two key assertions. First, that effective education in sexuality depends on inculcation of values, standards, and beliefs and, second, that parents and family have the general competency required to be effective educators in the arena of sexuality and family life. Because the key conclusion of this section rests on these assertions, it is crucial to explore their validity more thoroughly.

### *1. Effective Education in Sexuality Must Be Accompanied by Education in Morals and Values*

It is imperative that effective education in sexuality be accompanied by education in morals and values. The validity of this factual

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280. See *Disadvantages of Homeschooling*, SUCCESSFUL HOMESCHOOLING (last visited Feb. 13, 2012), <http://www.successful-homeschooling.com/disadvantages-of-homeschooling.html>.

281. *Id.*

282. ASHLEY & O'ROURKE, *supra* note 252, at 24.

283. *Id.*

284. *Id.* at 92.

assertion is confirmed largely because it is a central tenet of institutions representing opposite ends of the spectrum in debates related to sex education. Both sides inseparably intertwine values and morals with education relating to sexuality. *The consequence is that effective sex education necessarily is comprehensive education*, understanding that phrase to mean that discussions of the use of human sexuality should be infused with and guided by moralistic and value-laden perspectives and philosophies. From that perspective, both intellect-based and contraception-based sex education can be thought of as comprehensive. The following subsections illustrate how both sides adhere to this central factual assertion.

*a. Values and Morals: A Key Aspect of Contraception-Based Programs*

The idea that education relating to sexuality should never be severed from relevant values lies at the core of the position of advocates of contraception-based sex education. A review of materials and position papers by advocates such as Planned Parenthood and associated entities, SIECUS,<sup>285</sup> and the agencies associated with World Health Organization readily reveals a distinct value-laden philosophy.<sup>286</sup> This philosophy is one that views sexual activity by adolescents outside of marriage or a lifelong committed relationship as normal, natural and, indeed, necessary for a satisfactory and fulfilling life as an adult.<sup>287</sup> To those advocates, sexual activity by adolescents is, itself, not a problem. Rather, problems are early pregnancy, unsafe abortion, and STIs, including HIV/AIDS.<sup>288</sup>

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285. See *infra* note 287 and accompanying text (providing additional information about SIECUS).

286. See WORLD HEALTH ORG., INVESTING IN OUR FUTURE: A FRAMEWORK FOR ACCELERATING ACTION FOR THE SEXUAL AND REPRODUCTIVE HEALTH OF YOUNG PEOPLE 2 (2006), available at [http://whqlibdoc.who.int/wpro/2006/929061240X\\_eng.pdf](http://whqlibdoc.who.int/wpro/2006/929061240X_eng.pdf) [hereinafter WHO FRAMEWORK FOR ACTION] (discussing the importance of sexual education and adults' duty to protect youth and educate them about their rights and available resources).

287. Mary Calderone, a founder of SIECUS, expressed the view that "[t]he adolescent years are, among other things, for learning how to integrate sex usefully and creatively into daily living, therefore, we must accept that adolescent sexual experimentation is not just inevitable, but actually necessary for normal development." CLAIRE CHAMBERS, THE SIECUS CIRCLE: A HUMANIST REVOLUTION 15 (1977); see also HARTWIG, *supra* note 41, at 4 (contending that Christian sexual moral rules requiring abstinence cause more harm than good and are used in "divisive and hurtful ways"). Moore and Rosenthal similarly view adolescent sexual activity as a necessary aspect of growing up. See MOORE & ROSENTHAL, *supra* note 58, at 9, 94 (explaining that acts of non-intercourse such as petting are a part of exploration and discovery and opining as to the necessity of sexual experimentation as a means of achieving independence from parents and growing up).

288. WHO FRAMEWORK FOR ACTION, *supra* note 286, at iii. The goals, justification and strategies associated with the contraceptive-based approach are readily revealed by a

From this perspective, then, the overriding problem is not sexual activity, but “the unmet need for contraception” among young people,<sup>289</sup> including the need for chemicals and other types of barriers that oppress the natural biological function of the human reproductive organs.<sup>290</sup> The problems, or risks, according to proponents of the contraception-based approach, are merely consequences of natural and necessary activity.<sup>291</sup> Framed in this way, an appropriate goal of sex education is to make adolescents comfortable with the idea of engaging in sexual activity and empowering them to use strategies that purportedly lessen the risks.<sup>292</sup> The goal of “sexual health” is thus understood as being knowledgeable about how to achieve sexual pleasure and how to use strategies that purportedly reduce the risks of consequences such as disease and pregnancies.<sup>293</sup> While usually not

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careful study of these two World Health Organization documents; WORLD HEALTH ORG., PROMOTING AND SAFEGUARDING THE SEXUAL AND REPRODUCTIVE HEALTH OF ADOLESCENTS 1 (2006), available at [http://whqlibdoc.who.int/hq/2006/RHR\\_policybrief4\\_eng.pdf](http://whqlibdoc.who.int/hq/2006/RHR_policybrief4_eng.pdf) [hereinafter WHO POLICY BRIEF].

289. WHO FRAMEWORK FOR ACTION, *supra* note 286, at iii.

290. *See, e.g., Birth Control Pills*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/birth-control/birth-control-pill-4228.htm> (last visited Feb. 13, 2012) (explaining that birth control pills release hormones that, among other things, keep a woman’s ovaries from releasing eggs and entering ovulation). Additionally, the WHO’s documents stress a lack of knowledge needed to avoid STIs and unintended pregnancies, and a lack of timely access to products such as condoms and other contraceptives, as well as laws and other barriers that limit access to reproductive services. WHO FRAMEWORK FOR ACTION, *supra* note 286, at 2; WHO POLICY BRIEF, *supra* note 288, at 2.

291. WHO FRAMEWORK FOR ACTION, *supra* note 286, at 29.

292. MARTIN ET AL., *supra* note 9, at x. The key philosophical principle underlying recommended strategies relates to empowerment. Entities pushing the contraceptive-based approach claim that providing “age-appropriate sexual and reproductive information empowers [adolescents] to make responsible decisions regarding sexuality, thereby reducing the number of unintended pregnancies and STI incidence.” WHO POLICY BRIEF, *supra* note 288, at 2 (footnote omitted). According to proponents of this approach, an appropriate response is thus to provide information that is contraceptive in nature. *See* WHO FRAMEWORK FOR ACTION, *supra* note 286, at 25.

293. *See, e.g., Joe Fay, Teaching Teens About Sexual Pleasure*, 30 SIECUS REPORT 12, 14 (2002) (“Being able to acknowledge and enjoy sexual feelings is a component of sexual health.”). The objective is often masked by abstract statements that almost everyone would agree with. For example, in the landmark book *Sexuality Education: A Resource Book*, the authors stress that, rather than a “sex-negative” approach that stresses abstinence, educators should adopt a “positive” approach in which the reasons for sexuality education include:

to help prepare young people for upcoming stages of development, to increase comfort with the topic of sexuality, to increase the attitude that sexuality is a normal and positive part of human existence, to provide responsible answers to questions and concerns that arise in an age when the media bombard us with sexual messages, and to increase skills that will enable people to live happy, safe, and responsible lives as sexual beings.

Sandra L. Caron & Eilean Moskey, *Family Life Education in Maine Public Schools: A Ten Year Look at Changes in Topics, Policy, and Procedure*, 7 ELECTRONIC J. HUM. SEXUALITY, July 28, 2004, [http://www.ejhs.org/volume7/family\\_life.html](http://www.ejhs.org/volume7/family_life.html). Even those

expressly emphasized—and often expressly disclaimed<sup>294</sup>—key values do, of course, underlie these goals.

For advocates of the contraceptive-based approach, sex education is designed to make adolescents comfortable with the idea of engaging in sexual activity “when they are ready.”<sup>295</sup> In-class strategies include discussions of sexual desires and fantasies, interactive exercises that break down feelings of privacy, and values clarification exercises that encourage adolescents to question morals or values taught at home in order to free them to develop their own morals about engaging in sexual activity as adolescents.<sup>296</sup> Additionally, situational ethics is a core

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supporting an “abstinence-based” approach likely would agree that these abstract goals are largely appropriate. Other key resources, however, are more explicit. See Donn Byrne, *Sex Without Contraception*, in *ADOLESCENTS, SEX, AND CONTRACEPTION*, *supra* note 107, at 3, 21–22 (elucidating the need to move adolescents and our society in general away from the realm of erotophobia, which interferes with the use and acquisition of contraceptive knowledge).

The underlying values pushed by sex education experts is also revealed in the emphasis on people living as “sexual beings” as opposed to “human beings.” Human beings are effected by their sexuality, of course, but so are other animals. Because the phrase “sexual being” could be used to refer to any animal, it blurs the distinction between humans and other species. Yet, the sex education movement has always promoted the term “sexual being” to describe humans. See, e.g., Mary Lee Tatum, *Overview: A Perspective on School Programs*, in *SEXUALITY EDUCATION: A RESOURCE BOOK* 95, 95 (Carol Cassell & Pamela Wilson eds., 1989) (noting schools’ opportunities to provide youth with information about themselves as sexual beings). As Chambers notes, “the ‘SIECUS General Information’ pamphlet observes ‘the need to understand oneself as a sexual human being; that all children are born and grow up as sexual beings . . .’” and the SIECUS Study Guide #1 states: “Once and for all, adults must accept as fact that young people of all ages are sexual beings with sexual needs.” CHAMBERS, *supra* note 287, at 51 (citations omitted) (internal quotation marks omitted). The view is prevalent in the “humanist” movement, which has accordingly played a central role in the sex education movement. See *id.* at 53.

294. WHO FRAMEWORK FOR ACTION, *supra* note 286, at 24 (noting the importance of “sensitizing” health personnel so that they will not impose their own values on young people).

295. See Fisher, *supra* note 107, at 283, 290–98 (emphasizing the need for sex education strategies to make teens comfortable with their “sexual nature,” and providing examples of such strategies as well as exercises to break down emotional barriers to contraception). This view is also reflected in the latest recommendation from the American Academy of Pediatrics that adolescents “postpone consensual sexual activity until they are fully ready . . .” Comm. on Adolescence, *Contraception and Adolescents*, 120 *PEDIATRICS* 1135, 1135 (2007).

296. See, e.g., MARTIN ET AL., *supra* note 9, at 37 (detailing many of the visualization and other types of exercises used in contraceptive-based courses). Researchers Moore and Rosenthal explain that sexual fantasies can “help the adolescent develop a sexual identity and establish sexual preferences.” See MOORE & ROSENTHAL, *supra* note 58, at 19; see also Fisher, *supra* note 107, at 290–98 (describing exercises and strategies, including the use of fantasizing, designed to desensitize and counter-condition adolescents). For examples of value clarification exercises, see ELEANOR S. MORRISON & MILA UNDERHILL PRICE, *VALUES IN SEXUALITY: A NEW APPROACH TO SEX EDUCATION* 30–33 (1974) (detailing and providing teachers with instructions for many sexual education exercises).

In *Grand Illusions: The Legacy of Planned Parenthood*, George Grant details several examples of sex education exercises involving graphic films and requiring students to



component of contraception-based programs.<sup>297</sup> From a situational ethics perspective, no absolute rules of morality exist.<sup>298</sup> Whether an action is moral or immoral always depends on the circumstances or situation, and, in working through an analysis, pleasure is perceived as among the highest moral goods.<sup>299</sup>

From the contraception-based perspective, sex education empowers adolescents to use risk mitigating strategies by providing comprehensive information about and access to condoms and chemical contraceptives.<sup>300</sup> In addition, advocates of contraception-based sex education stress the importance of developing “life skills,”<sup>301</sup> using that term to include being able to “discuss a range of moral and social issues and perspectives on sex and sexuality, including different cultural attitudes and sensitive issues like sexuality, abortion and contraception,”<sup>302</sup> and being able to use a condom.<sup>303</sup> An express goal

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discuss in class very personal information and to practice using a condom by putting one on another student’s finger. He also discusses values clarification, peer facilitation, role playing, and imaging and sensitivity training exercises, all designed to expose and convert adolescents to views consistent with Planned Parenthood’s philosophies. GEORGE GRANT, *GRAND ILLUSIONS: THE LEGACY OF PLANNED PARENTHOOD* 109, 111 (2d. ed. 1992). Because of the coercive persuasion aspect of the exercises (which make heavy use of the techniques devised in the behavioral sciences and situation ethics), George Grant concludes that the exercises are “not designed to simply provide accurate biological information. Instead, they are designed to *change* the minds, morals, and motivations of an entire generation.” *Id.* at 111. He quotes former Planned Parenthood medical director Mary Calderone as stating that in sex education, “[m]ere facts and discussion are not enough. They need to be undergirded by a set of *values*.” *Id.* He quotes economist and social analyst Jacqueline Kasun as explaining that Planned Parenthood replaces “good biological education with ten to twelve years of compulsory consciousness raising and psycho-sexual therapy, and use[s] the public schools to advance their own peculiar worldview.” *Id.* at 116 (emphasis omitted) (internal citation omitted).

297. See WETZEL, *supra* note 52, at 183 (introducing the important role of morality in creating meaningful discussions about sex).

298. The situational ethics philosophy can be summed up as follows: “There probably cannot ever be any absolutely correct or proper rules of morality, since people and conditions change over the years and what is ‘right’ today might be ‘wrong’ tomorrow. Sane ethics are relativistic and situational.” *Id.* at 192 (quoting Albert Ellis, *Rationality in Sexual Morality*, *HUMANIST*, Sept.–Oct. 1969, at 18 (internal quotation marks omitted)).

299. *Id.* at 195 (quoting from a treatise on sexual ethics printed in *The Humanist* magazine in which “actualizing pleasures” is described as “among the *highest* moral goods.”).

300. See WHO POLICY BRIEF, *supra* note 288, at 2.

301. See WHO FRAMEWORK FOR ACTION, *supra* note 286, at 15.

302. *Sex Education that Works*, AVERT, <http://www.avert.org/sex-education.htm> (last visited Feb. 13, 2012). Life skills are sometimes described more generally as including being able to communicate, listen, negotiate, ask for help, resist pressure, and to deal with and challenge prejudice. *Id.*

303. See MARTIN ET AL., *supra* note 9, at 36 (describing the various types of exercises relating to condom use, e.g., “Give each participant (or pair of participants) a condom and lubricant. Each participant should practice putting condoms on their fingers. Then let them give you a demonstration.” (citation omitted)); Caron & Moskey, *supra* note 293. These are sometimes labeled as “positive” topics, because their focus relates to “how to” engage in



of advocates of contraceptive-based, school-based sex education is to design programs that increase utilization of contraceptives and other “family planning” services, and programs that ensure youth-friendly services and clinics in areas readily accessible to youth.<sup>304</sup>

Because sexual activity and intimacy by adolescents is considered natural and necessary,<sup>305</sup> the practice of abstinence is painted as unrealistic and, indeed, as a practice with potentially harmful consequences.<sup>306</sup> Sexual abstinence is viewed as impoverishing and as inadequate preparation for later committed relationships.<sup>307</sup> It is believed that achieving the stated goals requires not just inclusion of topics such as abstinence, STIs, HIV/AIDS, anatomy and physiology, reproduction, and the birth process, but it must also include extensive information about, and exercises related to, topics such as masturbation, sex for pleasure, birth control/contraception, abortion, sexual orientation, and gay/lesbian/bisexual issues.<sup>308</sup> It is also considered

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sexual activity, as opposed to a focus on enabling adolescents to eliminate the risk of adverse consequences by avoiding sexual activity. *Id.*

304. See MARTIN ET AL., *supra* note 9, at 39 (“Teenagers can obtain birth control pills from family planning clinics and doctors without permission from a parent: Truth. You do not need a parent’s permission to get birth control at a clinic. No one needs to know . . .” (citation omitted)); WHO FRAMEWORK FOR ACTION, *supra* note 286, at 24 (listing as one of the World Health Organization’s goals the increased utilization and targeting of reproductive health services for young people).

305. See, e.g., MOORE & ROSENTHAL, *supra* note 58, at 9 (explaining that adolescent sexual experiences provide opportunities for “acquiring the skills in intimacy which are necessary if one is to establish a long-term partnership”).

306. See, e.g., GERARD LEMOS, FREEDOM’S CONSEQUENCES: REDUCING TEENAGE PREGNANCIES AND THEIR NEGATIVE EFFECTS IN THE UK 7 (2009) (“Abstinence education generally does not work . . .”).

307. See, e.g., HARTWIG, *supra* note 41, at 3, 9 (describing sexual intimacy as “vital” for one’s well-being). To Hartwig, successfully selecting a sexual companion for life requires a long process of learning how to be intimate before the lifelong commitment is made, and abstinence thereby becomes something risky. See *id.* at 9. Hartwig explicitly extends his thesis to teens and young adults. See *id.* at 36. Regarding single adults, he states that they should not be required by moral norms to suffer the impoverishing features of long-term or lifelong abstinence; such norms are supported by “theories of sexuality that fail to recognize sexual intimacy’s importance in the maturation and flourishing of personal life and, thus, constitute a personally alienating and abusive moral system.” *Id.* at 35; see also *id.* at 125–54 (addressing single adult sexuality). Hartwig’s views relating to adolescent sexuality are similar, but he devotes greater efforts to justifying them. He acknowledges that “[y]oung adolescents are not usually capable of the kind of emotional intimacy that would constitute an impoverishment in its absence,” and, further, that sexual addiction can develop due to an inability to integrate emotional and physical intimacy. *Id.* at 35–36. He counters these concerns, however, by pointing to the need for “new insights into the psychologically neutral aspect of sexual experimentation and play among adolescents.” *Id.* at 36. Thus, given his thesis that sexual abstinence is impoverishing and inadequate preparation for committed sexual relationships, he advocates that “a poetic approach to sexuality education and sexual virtue” is a necessary supplement to any moral message to youth about sexuality. *Id.*

308. See, e.g., Caron & Moskey, *supra* note 293. After reviewing the survey results of health education teachers conducting family life/sex education in schools, the author

important to promote the adoption of a broad range of meanings for sexuality, e.g., “play, passion, consolation, . . . healing,” or an attempt to connect emotionally.<sup>309</sup>

All these messages are tied to a distinct set of values, primarily autonomy and utilitarianism, i.e., the choice of engaging in premature sexual activity is neither right nor wrong, but is a personal choice and using another for pleasure is acceptable as long as one tries to lessen the risk of significant harms to the other.<sup>310</sup> Indeed, it is precisely because of the importance of inculcating a particular set of values that Planned Parenthood, SIECUS, WHO agencies, and other similarly minded groups advocate for education stretching from kindergarten until twelfth grade.<sup>311</sup> Further, because of the importance of inculcating values, strategies explicitly discuss the importance of providing information in sites away from home and the need to overcome expected parental resistance.<sup>312</sup> Recommended actions include “re-orienting”

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lamented the lack of progress revealed by the fact that most teachers—although noting agreement with the goals in Cassell’s book—believed that the curriculum should *not* include topics such as gay/lesbian/bisexual issues, sex for pleasure and masturbation. *See id.*

309. *See* HARTWIG, *supra* note 41, at 93–94. Further, according to Hartwig, adolescents who practice abstinence

are deficient in the kinds of skills needed to form good and sustainable adult sexual relationships. . . . This may lead to tragically flawed choices . . . [or] they may find it difficult as adults to express and embody warmth, affection and tenderness in ways that solidify and strengthen mutuality. This can lead to the breakdown of otherwise good marriages. While there are clear risks associated with sexual intimacy (pregnancy, AIDS, STDs, and emotional vulnerability), there are real dangers associated with the failure to practice and learn the language of sexual intimacy.

*Id.* at 98–99.

310. In other arenas, autonomy and utilitarianism often have positive aspects. In the context of sexual activity by adolescents, the reality is more negative than positive. Values such as self-giving love and commitment are downplayed because waiting until one finds a lifelong partner is thought to be too difficult. Youth are taught that they have a right to use their sexuality as they deem appropriate, and limited corresponding duties. *See* Robert Rector, *The Effectiveness of Abstinence Education Programs in Reducing Sexual Activity Among Youth*, BACKGROUND, Apr. 8, 2002, at 4, available at <http://www.heritage.org/research/reports/2002/04/the-effectiveness-of-abstinence-education-programs>. Responsibility is emphasized, but it is a limited form of responsibility. Moreover, the natural fertility inherent in human sexuality is painted as a problem so that it becomes acceptable to suppress and manipulate healthy reproductive organs. *See* ANGELA FRANKS, MARGARET SANGER’S EUGENIC LEGACY: THE CONTROL OF FEMALE FERTILITY 204 (2005).

311. GRANT, *supra* note 296, at 116.

312. The strategy outlined in *Investing in Our Future* minimizes the role of parents. WHO FRAMEWORK FOR ACTION, *supra* note 286. The strategy calls for compulsory inclusion in school curricula beginning at the primary school level. *Id.* at 17. Moreover, the strategy explicitly calls for agencies to overcome the expected parental resistance or objections to the agencies’ direct efforts to provide—in sites away from home—comprehensive information about sexual activity and access to sexual aids.

One of the challenges for such programmes . . . is that the concept of sex education is often misinterpreted by parents and community leaders, largely

and “desensitizing” parents and the community.<sup>313</sup> Indeed, as explained below, from the beginning, a key strategy of the contraceptive approach has been to “separate kids from their parents.”<sup>314</sup>

*b. Values and Morals in Intellect-Based Programs*

On the opposite side of the spectrum, the point that education relating to sexuality should always be accompanied by appropriate values is also strongly advocated. As explained in Part I, advocates of the intellect-based approach see sexual activity by adolescents as the problem that must be addressed because it necessarily and always places them and others at risk for serious short and long-term health consequences. The goal of education in intellect-based programs, then, is not to mitigate, but to *eliminate* the risks and problems associated with adolescent sexual activity by empowering teens to avoid the activity, for the purpose of preserving the potential for lifelong optimal use of sexuality, i.e., a life in which an adult couple with a lifelong commitment to each other can enjoy a sex life that is fully natural and love affirming.<sup>315</sup> Achieving the goal is dependent on successful integration of values and life skills—but values and skills of a very different sort.

Before illustrating the values and skills, however, it is noteworthy that a key advocate for an approach to sex education grounded in the classic philosophical understanding of intellect and will—the Catholic Church—has a long history of arguing for, and *explaining the basis* for, the position that effective education in sexuality must be accompanied by education in morals and values. Although advocates of the contraception-based approach seem to want to mask this central tenet

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due to misunderstandings about the goal and the content. Such a situation can lead to resistance and reduce the receptiveness of such programmes at the community level. Parental and community support is key to the success of educational interventions. It is necessary to raise awareness among adults that sexual and reproductive health education does not lead to promiscuity, but promotes positive sexual and reproductive health behaviour.

*Id.* at 16; *see also id.* at 33 (“Lack of political will and support is a major obstacle . . . . [One reason for this is] strong pressure from opposing political, religious or community groups.”). Proponents of the strategy state that apprehension and resistance to the WHO agenda is “unwarranted.” *Id.* at 30.

313. *Id.* at 30–31. “Re-orienting” refers to encouraging parents to accept that organizations should provide comprehensive and accurate information about sexuality and reproductive health (i.e., products and services). *Id.* at 30–31, 36.

314. *See* GRANT, *supra* note 296, at 109.

315. *See* THE PONTIFICAL COUNCIL FOR THE FAMILY, *THE TRUTH AND MEANING OF HUMAN SEXUALITY: GUIDELINES FOR EDUCATION WITHIN THE FAMILY* ¶ 17, at 11 (1996) (noting how the Catholic Church, which is one of the biggest proponents of abstinence/intellect-based programs, believes chastity is necessary for the development of healthy relationships).

of their approach, the Church has been clear and express.<sup>316</sup> To the Church, the inseparable link between sexuality and values stems from an “integral vision of human persons.”<sup>317</sup> This understanding of the human person posits that happiness and well-being for humans is achieved only by taking into account the human person as a whole, including physical and spiritual; intellectual and moral; individual, domestic, and social aspects.<sup>318</sup> From this perspective, then, physical aspects of sexuality must coincide with the spiritual and intellectual aspects, such that sexuality enriches the whole person.<sup>319</sup>

The integral vision of the human person bears vitally on all education, but especially on education in sexuality. Pope John Paul II emphasized this point in 1981 in *Familiaris Consortio*.<sup>320</sup> John Paul II used this document to reiterate and explain Church teachings on sexuality and to emphasize the important role of families in providing solid education and formation in sexuality.<sup>321</sup> After stressing the irreplaceable and inalienable nature of the parental right and duty to educate their children, the Pope calls on parents to “trustingly and courageously train their children in the essential values of human life,” including an “[e]ducation in love as self-giving.”<sup>322</sup> He emphasizes:

Faced with a culture that largely reduces human sexuality to the level of something common place, since it interprets and lives it

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316. Many advocates of abstinence-based programs, of course, are not associated with the Catholic Church. See CHRIS COLLINS ET AL., ABSTINENCE ONLY VS. COMPREHENSIVE SEX EDUCATION: WHAT ARE THE ARGUMENTS? WHAT IS THE EVIDENCE? 12 (2002). Indeed, many are purely secular in nature. See *Our History*, MED. INST. FOR SEXUAL HEALTH, <http://www.medinstitute.org/public/242.cfm> (last visited Feb. 13, 2012). Nonetheless, this article focuses on the documents of the Catholic Church because the Church’s official teaching office has spoken repeatedly and systematically on the topic of education in sexuality, beginning with *Divini Illius Magistri* in 1929 and more strongly in a number of documents since Vatican II. Pope Pius XI, *supra* note 270. In *Divini Illius Magistri*, Pius XI denounced as clearly inadequate the emerging notion of *secular* sex education. See *id.* at 56. Pius emphasized that indiscriminate instruction, which ignored the integral nature of man, was bound to fail. See *id.*; see also Pope John Paul II, *Familiaris Consortio*, EWTN ¶ 32 (Nov. 22, 1981), <http://www.ewtn.com/library/PAPALDOC/JP2FAMIL.HTM> (discussing the role of the Christian family in the modern world). In contrast, he advocated for careful and private instruction consistent with Christian educational principles. Pope Pius XI, *supra* note 270, at 56. Pius explained that “the subject of Christian education is man whole and entire, soul united to body in unity of nature, with all his faculties natural and supernatural, such as right reason and revelation show him to be.” *Id.* at 54. Secular sex education was bound to fail due to its “pedagogic naturalism which . . . excludes or weakens supernatural Christian formation in the teaching of youth.” *Id.* at 54–55.

317. PAUL FLAMAN, *PREMARITAL SEX AND LOVE: IN THE LIGHT OF HUMAN EXPERIENCE AND FOLLOWING JESUS* 64 (2003).

318. Pope John Paul II, *supra* note 316, ¶ 32.

319. *Id.* ¶ 37.

320. *Id.* ¶ 32.

321. *Id.* ¶¶ 16, 37.

322. *Id.* ¶ 37.

in a reductive and impoverished way by linking it solely with the body and with selfish pleasure, the educational service of parents must aim firmly at a training in the area of sex that is truly and fully personal: for sexuality is an enrichment of the whole person—body, emotions and soul—and it manifests its inmost meaning in leading the person to the gift of self in love.<sup>323</sup>

Thus, the point is not just that inculcation of values fosters effectiveness because it renders a person more likely to act in a certain way in a given set of circumstances. Rather, the more important point is that human actions foster the human quest for happiness only when a physical act—a human act—is in harmony with the spiritual, emotional, and moral aspects of the actor, that is, when body and soul are in sync. Further, the greatest satisfaction of the human quest for happiness is achieved only if body and soul are oriented towards truth. In the specific context of sexuality, this means that the greatest satisfaction is achieved when the use of sexuality is consistent with its natural (biological or physical) meaning and its supernatural (spiritual) meaning. Both meanings are tied to self-giving and commitment. Indeed, as reiterated in another document issued by the official teaching office of the Church, “[t]he use of sexuality as physical giving has its own truth and reaches its full meaning when it expresses the personal giving of man and woman even unto death.”<sup>324</sup>

This “integral vision” of sex education was similarly highlighted in another document, *Educational Guidance in Human Love: Outlines for Sex Education*,<sup>325</sup> issued in 1983 by the Sacred Congregation for

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323. *Id.*

324. THE PONTIFICAL COUNCIL FOR THE FAMILY, *supra* note 315, ¶ 3, at 4. The Council produced *The Truth and Meaning of Human Sexuality* in response to “repeated and pressing requests” to support parents as they strive to undertake their duty of providing to their children appropriate education in sexuality and love. *Id.* ¶ 1, at 3. The Council recognized that many parents felt unequipped for the task, especially in light of the decline in traditional values in society generally stemming from a distorted and individualistic view of freedom, the modern and impoverished view of sexuality, and the mass media’s pessimistic portrayal of sexuality as depersonalized and recreational. *Id.* The document reiterates the principle of subsidiarity and provides pastoral guidelines for the family’s education of children. *Id.* ¶ 23, at 14, ¶¶ 41–43, at 23–24. In this document, the Council strives to explain clearly the fundamental content of the Church’s teaching relating to human sexuality and the reasoning supporting the Church’s teaching, so that parents will be able to have effective and persuasive discussions with their children.

325. Sacred Congregation for Catholic Educ., *Educational Guidance in Human Love*, VATICAN, [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_19831101\\_sexual-education\\_en.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19831101_sexual-education_en.html) (last visited Feb. 13, 2012). The document highlights key principles from prior Magisterium documents, outlines the Christian concept of human sexuality, drawing from statements and ideas presented in General Audiences of Pope John Paul II and in *Gaudium et Spes*, and then provides extensive and detailed guidance for sex education. *Id.* ¶¶ 17, 19–20. It is clear that the Congregation

Catholic Education. The document defines the objective of sex education as “adequate knowledge of the nature and importance of sexuality and of the harmonious and integral development of the person towards psychological maturity, with full spiritual maturity in view.”<sup>326</sup> The document reinforces the idea that education must consider the “totality of the person and insist therefore on the integration of the biological, psycho-affective, social and spiritual elements.”<sup>327</sup> As explained by the Congregation, education must promote sexuality as an opportunity to offer authentic love.<sup>328</sup> From this perspective, education is much more than the imparting of information; it involves the person “in all his or her totality and complexity” as each student is helped to develop the capacities needed to achieve integration of the whole person.<sup>329</sup>

The intellect-based approach develops the capacity for integration through continuous reinforcement of values and continuous development of necessary life skills.<sup>330</sup> The values emphasized are a correct attitude of freedom and a sense of true justice and true love.<sup>331</sup> Parents are encouraged to provide a solid example of the self-giving love that should exist between husband and wife and to encourage ways that children can practice self-giving.<sup>332</sup> Additionally, in stark contrast to situation ethics, a key aspect of the intellect-based message is that thoughtful and effective education in sexuality will instill in children knowledge of and respect for moral norms, not as rules to be followed at one’s peril, but as the true and valuable guarantee for responsible

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is presenting the ideas and concepts that had come to be known as Pope John Paul II’s “Theology of the Body.” Compare *id.* nn.17–20, 22 & 27 (citing Pope John Paul II’s General Audiences), with Pope John Paul II, *General Audiences: John Paul II’s Theology of the Body*, EWTN, <http://www.ewtn.com/library/papaldoc/jp2tbind.htm> (last visited Feb. 13, 2012) (organizing the General Audiences by date and providing links to documents). The overarching idea presented is that sexuality is oriented towards interpersonal communion and contributes to the integral maturation of the human person, opening them to the gift of self in love. “Love and fecundity are meanings and values of sexuality which include and summon each other in turn, and cannot therefore be considered as either alternatives or opposites.” Sacred Congregation for Catholic Educ., *supra*, ¶ 32. Further, the Congregation emphasizes that, for the single person, the married person, and the person who chooses celibacy for the sake of the kingdom, “[i]n all these cases the affective life must be gathered and integrated in the human person.” *Id.* ¶ 33.

326. Sacred Congregation for Catholic Educ., *supra* note 325, ¶ 34.

327. *Id.* ¶ 35. True formation includes both informing the intellect and disciplining the will, feelings, and emotions. *Id.* ¶ 35. Maturation requires self control, which presupposes modesty, temperance, and respect for others. *Id.* ¶ 35.

328. *Id.* ¶ 36 (noting that authentic love encompasses a capacity for “spontaneous contacts, emotional self control and commitment of his free will”).

329. *Id.* ¶ 37.

330. COLLINS ET AL., *supra* note 316, at 1.

331. Pope John Paul II, *supra* note 316, ¶ 37.

332. *Id.*



and fulfilling personal growth in human sexuality.<sup>333</sup> Those norms include moral absolutes grounded in authentic love.<sup>334</sup> Love involves protecting the beloved, not subjecting him or her to significant and unnecessary risks for the sake of the few moments of pleasure that accompany sexual activity. For example, it is wrong to subject another human being to risks associated with sexual activity outside of a fully loving and committed relationship,<sup>335</sup> and it is right to use one's sexuality only if ready and willing to fully respect and protect the human life which may be produced by the activity, including the child's right to grow up within the protective circle of the love of its parents.<sup>336</sup> From this perspective, then, sexuality that is truly human and integrated by love is "total, faithful, and its fruitful."<sup>337</sup>

The key life skill necessary for this approach to human sexuality is positive discipline. This positive discipline is essential because it develops a person's authentic maturity and makes a person *capable* of respecting sexuality.<sup>338</sup> In the context of sexuality, this positive discipline is traditionally referred to as chastity.<sup>339</sup> As explained by The Pontifical Council for the Family in its *Guidelines for Education within the Family*:

One cannot give what one does not possess. If the person is not master of self—through the virtues and, in a concrete way, through chastity—he or she lacks that self-possession which makes self-giving possible. Chastity is the spiritual power which frees love from selfishness and aggression. To the degree that a person weakens chastity, his or her love becomes more and more selfish, that is, satisfying a desire for pleasure and no longer self-giving.<sup>340</sup>

Thus, the positive discipline of chastity empowers the intellect to properly direct and control sexuality. The Council acknowledges that if chastity is not valued or developed, living in a chaste way can be difficult, for it "requires rejecting certain thoughts, words and sinful

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333. See Sacred Congregation for Catholic Educ., *supra* note 325, ¶ 40.

334. See *id.* ¶ 90 (discussing modesty, a well-known moral absolute).

335. See *id.* (encouraging people to respect, and therefore protect, the human body).

336. THE PONTIFICAL COUNCIL FOR THE FAMILY, *supra* note 315, ¶ 15, at 10.

337. *Id.* ¶ 29, at 17. The Council refers to sexuality as "responsible love at the service of fatherhood and motherhood." *Id.* ¶ 6, at 5. Properly formed within a family open to life, the Council notes that children will recognize family as "an inseparable part of the vocation to marriage." *Id.* ¶ 32, at 19.

338. Sacred Congregation for Catholic Educ., *supra* note 325, ¶ 18.

339. *Id.*

340. THE PONTIFICAL COUNCIL FOR THE FAMILY, *supra* note 315, ¶ 16, at 11 (emphasis omitted).

actions.”<sup>341</sup> For that reason, the period of adolescence should be considered an “apprenticeship in self-mastery.”<sup>342</sup> Yet, chastity leads to an inner peace that is freeing and that enables a person to joyfully enter into a lifelong committed relationship.<sup>343</sup>

In addition to the different values and skills highlighted, then, this approach differs from the contraception-based approach in another fundamental way. The intellect-based approach is grounded in the understanding that effectively addressing the concern surrounding adolescent sexuality does not hinge primarily on information and access. It hinges on developing a person’s capabilities in relation to decisions about actions—what has traditionally been referred to as the human free will.<sup>344</sup> Whereas the contraception-based approach routinely asserts that it is unrealistic to expect adolescents and young adults to refrain from sexual activity, the intellect-based approach fully respects the human potential to determine human actions.<sup>345</sup> Proper education and formation in positive discipline can empower young persons to derive great satisfaction from the fact that their intellect and will can guide their senses and passions. Armed with the cultivation of values and positive disciplines, human persons are thus made capable of achieving what some have called a “higher kind of love.”<sup>346</sup>

### *c. Comprehensive Integration of Values Is Indispensable*

For institutions at both ends of the spectrum, then, effective sex education is *comprehensive* education—comprehensive from the perspective of integrating morals and values into any discussion of the use of human sexuality. Once one moves beyond the physiological and biological facts relating to human reproductive health, the religious, cultural, and moral aspects of sexuality rise to the fore and become the predominant aspect of the education program. It is the extensive infusion of morals and values, along with the needed discipline, that

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341. *Id.* ¶ 18, at 12.

342. *Id.* ¶ 18, at 11 (emphasis omitted).

343. *Id.* ¶ 17, at 11.

344. WEBSTER’S COLLEGE DICTIONARY 531 (1991).

345. COLLINS ET AL., *supra* note 316, at 1.

346. THE PONTIFICAL COUNCIL FOR THE FAMILY, *supra* note 315, ¶ 9, at 7. As described by John Paul II, this higher love is a love that is beautiful, but demanding—but “by the very fact that it is demanding, it builds up the true good of man.” *Id.* ¶ 9, at 8. Love that acquires this “truly human quality” becomes a power that enriches the whole person—body, emotions, and soul. *Id.* ¶ 11, at 9 (quoting Sacred Congregation for Catholic Educ., *supra* note 325, ¶ 6 (internal quotation marks omitted)). According to John Paul, this higher love leads to a “civilization of love” rather than a “civilization of things” in which persons are used in the same way that things are used. *Id.* (internal quotation marks omitted).

makes the education effective. Thus, the first factual assertion underlying the appropriateness of a parent-centered approach is accurate: morals and values are inseparable from, and a key tenet of, effective education in sexuality.

## *2. Parents and Family Can Competently Teach Family Life Education*

Analysis of the competency of parents and family to teach education in sexuality is important because, pursuant to Supreme Court precedent and the principle of subsidiarity, State assumption of the responsibility of education is delimited by what is necessary.

### *a. Parents Can Competently and Sufficiently Teach Biological Aspects of Sexuality*

Sound education in sexuality must include sufficient physiological and psychological information relating to the human reproductive system and the growth and development of adolescents.<sup>347</sup> Indeed, for some (perhaps many) parents or others who have not studied the content of sex education classes that have been or are being offered in the school setting, the assumption might be that their content is limited to biological aspects of human reproduction and sexuality. The statistics highlighted in Part I readily show that such an assumption is erroneous. Still, it is correct that certain physiological and psychological information absolutely constitutes a necessary component of an appropriate education in sexuality.<sup>348</sup>

Despite their belief otherwise, parents are competent to convey that pertinent information.<sup>349</sup> The necessary biological information relating to human reproductive capacities and the diseases that are readily transmitted through sexual activity is certainly somewhat complex, but not too complex for parents to explain. For example, the author of this article has been participating in a course for sex education educators, specifically, the Basic Adolescent Sexuality Education program (the BASE program).<sup>350</sup> The course has included numerous

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347. See *Sexuality Education Q & A*, SIECUS, <http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=521&grandparentid=477&parentid=514> (last visited Feb. 13, 2012).

348. See *id.*

349. See Aditi Dasgupta, *Parents' Responsibility in Sex Education*, ONLYMYHEALTH (Apr. 26, 2011), <http://www.onlymyhealth.com/parents-responsibility-in-sex-education-1301381892> (explaining that parents can, and should, provide both a moral and biological explanation of sex to their children).

350. The course is organized by the Fertility, Sexuality and Family Relations Institute of Valencia (IVAF) and the Spanish Section of the Pontifical Institute John Paul II. *Base*

fairly in-depth lessons relating to the biology of the human reproductive system and the psychological and emotional aspects of adolescence.<sup>351</sup> The material has been readily understandable, even for someone who has not taken a science class for almost thirty years. There is no doubt that many resource materials exist or can be produced that will enable parents to be effective educators.<sup>352</sup>

More importantly, however, the key idea is that in the course of discussions between parents and teens about the basic biological aspects of human sexuality, parents can, at the same time, discuss values and morals. It is this indispensable link between the factual information and values that must be fostered. Parents are likely to find it easier to discuss both in the more structured context that will be necessary for effective home-based sex education.

To be sure, many parents may need assistance of varying types in carrying out their duty relating to education and formation of their children. Some parents may be hesitant to engage in discussions relating to sexuality and simply need encouragement and support. Others may need help in identifying information and materials they want to use to help with the educational task or may want to attend some class sessions themselves where they are taught what they will in turn teach their children. Still others may need help in developing the reasons supporting the values and moral messages they want to impart. The State can assist parents in each of these areas without compromising the parental right or the principle of subsidiarity.<sup>353</sup>

Furthermore, a parent-centered approach would not preclude schools from *also* teaching basic biology and physiology relating to human anatomy and the natural operation of the human reproductive organs, nor, of course, the more complicated aspects of genetics that often are part and parcel of high school level biology classes. Nor

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(*Basic Adolescent Sexuality Education*): *Description*, IVAF, <http://www.ivaf.org/base/description.html> (last visited Feb. 13, 2012).

351. See *Base (Basic Adolescent Sexuality Education): Program*, IVAF, <http://www.ivaf.org/base/program.html> (last visited Feb. 13, 2012). The lessons are: 1) Puberty; 2) The Male Reproductive System; 3) The Female Genital Tract; 4) The Reproductive Hormones; 5) Psychosexual Differences between Boys and Girls; 6) The Menstrual Cycle; 7) Biologic Signs of Ovulation; 8) Fertility Awareness; 9) Human Sexuality; 10) The Sexual Act: Copulation; 11) Methods of Fertility Awareness; 12) Sperms in the Female Genital Tract; 13) Fertilization and Conception; 14) Pregnancy; 15) Contraception; 16) Interpersonal Communication; 17) The Family; 18) Friendship; 19) Homosexuality; 20) Assisted Reproduction Techniques; and 21) Sexually Transmitted Infections. *Id.* Every lesson includes factual information plus suggested discussion questions through which the educator can introduce discussion of values. *Id.*

352. See, e.g., *Base (Basic Adolescent Sexuality Education): Description*, *supra* note 350 (providing one example of such resources); see also WETZEL, *supra* note 52, at 239–56 (advising parents on the best means to educate children about sex).

353. See Pope Pius XI, *supra* note 270, at 49.

would it preclude schools from teaching factual information about the incidence of communicable diseases—including factual information about the incidence of HIV/AIDS or STIs—and the serious consequences of STIs. In the school environment, however, these matters can and should be taught severed from education in sexuality and with a firm commitment towards respecting the rights and duties of parents and families. At the same time, schools should be clear in expressing the basic and undeniable medical truth that refraining from sexual activity until one finds a lifelong partner is *certainly an attainable goal and clearly the surest way to protect and safeguard genuine reproductive health*.<sup>354</sup> This message would promote the important state interest in the health and well-being of its citizens and, yet, would not infringe on any set of values that a parent may wish to impart—including parents who may prefer a contraceptive-based message.

*b. Only Parents Can Provide Genuinely Age-Appropriate, Gradual, and Individualized Education in Sexuality*

An effective inculcation of values requires years of work. As noted, this is precisely why promoters of a contraceptive-based approach to sex education in schools advocate for education stretching from kindergarten until twelfth grade.<sup>355</sup> Yet, it is parents and family who can most effectively ensure the appropriateness of when and how education in sexuality occurs.<sup>356</sup> Advocates of contraception-based sex education repeatedly stress that they are only advocating that schools provide “age-appropriate” sex education.<sup>357</sup> This phrase generally is emphasized as a means of allaying concerns that children may be exposed to material before they are ready. In a school setting, however, educators teach a set curriculum to an entire class.<sup>358</sup> In addition to controversy over curricular content, the likelihood that an entire class is ready to hear the same level of sex education information is simply unrealistic. Data from the 2000 Kaiser Study showed that

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354. See *Abstinence*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/preventingpregnancy/abstinence.html> (last updated Aug. 2007) (explaining that abstinence, when practiced consistently, prevents pregnancy and STDs 100% of the time).

355. See, e.g., *Sex Education Policy*, FAM. PLAN. ADVOC. N.Y. ST., <http://www.familyplanningadvocates.org/programs/sex-education/sex-education-policy/> (last visited Feb. 13, 2012) (describing the development of a kindergarten-through-twelfth-grade sex education curriculum).

356. Dasgupta, *supra* note 349.

357. *Sex Education Policy*, *supra* note 355.

358. E.g., *Core Curriculum Content Standards*, ST. N.J. DEPARTMENT EDUC., <http://www.state.nj.us/education/cccs/standards/2/index.html> (last visited Feb. 13, 2012) (noting that New Jersey educators must teach a required set of classes).

some teens reported that topics were not covered at the right time.<sup>359</sup> Further, ample anecdotal evidence exists that proves, over the past decades of school experimentation with school-based sex education, students have been subjected to material and information that they found startling<sup>360</sup> and could readily be characterized as harmful to that child.<sup>361</sup>

In contrast, parents and family can readily gauge what information is appropriate at what time, in what form, and by which parent, thereby ensuring truly age-appropriate and individualized education. One important area in which a majority of parents have *not* been satisfied with school-based sex education relates to the school decision to integrate classes, teaching girls and boys together.<sup>362</sup> A substantial majority of teachers (81%) reported that they taught all sessions with boys and girls together.<sup>363</sup> Yet, most parents (54%) reported that they thought it was best to have separate classes for boys and girls.<sup>364</sup> Parents can also more efficiently introduce information in a gradual manner and repeat information as needed on an individual basis. The importance of these considerations in achieving truly “age-appropriate and properly comprehensive” education in sexuality was stressed in the *Guidelines for Education within the Family*, issued by The Pontifical Council for the Family.<sup>365</sup> In that document, the Council emphasized that each child must receive individualized and personal formation.<sup>366</sup> In particular, the Council explained that intimate aspects, both biological and emotional, should be communicated in personalized dialogue in which parents can give some form of personal witness to sexuality; ordinarily, the person communicating the biological, emotional, moral, and spiritual information should be the same sex as the child or young person.<sup>367</sup> Because of the unique ability of the family to provide a truly age-appropriate, individualized, and private education in sexuality, the second factual assertion is also amply supported:

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359. 2000 KAISER STUDY, *supra* note 32, at 67 (finding over 30% of students reported that topics were not covered at the right time, with some being covered too early and some being covered too late).

360. *See, e.g.*, GRANT, *supra* note 296, at 106–08 (relating one female student’s discomfort at a health class presentation by Planned Parenthood).

361. *See, e.g., id.*

362. 2000 KAISER STUDY, *supra* note 32, at 80.

363. *Id.* at 90.

364. *Id.* at 80.

365. THE PONTIFICAL COUNCIL FOR THE FAMILY, *supra* note 315.

366. *Id.* ¶ 65, at 33.

367. *Id.* ¶¶ 65–67, at 33–34. The Council also stressed that parents must carefully discern the time and ways of imparting the education to their children. *Id.* Children must be treated in a personalized way, according to their unique physiological and psychological development. *Id.* ¶ 75, at 36.



parents and family have the competency required to be effective educators in the arena of sexuality and family life.

*D. The Family: A Superior Environment for Comprehensive Family Life Education*

For many reasons, then, school-based sex education violates the principle of subsidiarity as well as the natural and inalienable parental right recognized by the Supreme Court. Effective education depends on extensive inculcation of morals, values, and beliefs,<sup>368</sup> and the range of values and morals to choose from are many and varied. Determining which cultural and moral messages related to sexuality are appropriate to pass on to children is clearly a matter within the realm reserved for parents and family.

States certainly have some responsibility and authority to keep in check certain types of activity that may widely be considered immoral.<sup>369</sup> For example, subject to constitutional limitations, States may decide that certain acts are so sufficiently egregious that their commission warrants some state-imposed penalty.<sup>370</sup> Criminal laws of this sort constitute an acceptable type of inculcation of values.<sup>371</sup> Yet, it is parents, rather than the State, who properly have authority to inculcate values that will guide and direct children as they make decisions about whether to engage in an activity that has *not* been declared unlawful by the state—especially human reproductive activity, which naturally is at the heart of family life.

The State may elect to punish dishonesty only in certain types of situations, but some parents may believe they have a duty to instill in their children a firm appreciation for honesty on a much broader scale. The State may allow divorce and remarriage, but parents may believe they have a duty to instill a firm understanding that marriage is a commitment for life. The State may allow pharmaceutical companies to manufacture and sell drugs and devices that prevent pregnancy or cause a very early abortion, but parents may believe they have a duty to instill a full understanding of the beauty of reserving

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368. See J. Mark Halstead, *Values and Values Education in Schools*, in *VALUES IN EDUCATION AND EDUCATION IN VALUES* 2, 2 (J. Mark Halstead & Monica J. Taylor eds., 1996); W. Huitt, *Values*, *EDUC. PSYCHOL. INTERACTIVE* (2004), <http://www.edpsycinteractive.org/topics/affect/values.html>.

369. See *The Limits of Law*, *STANFORD ENCYCLOPEDIA PHIL.* (Feb. 27, 2006), <http://plato.stanford.edu/entries/law-limits/#mean>.

370. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . .").

371. Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 *B.C. L. REV.* 1327, 1330 (2008).

sexuality for married persons who are fully open to the potential life that may result from engaging in sexual activity.

In all of these examples, the values at play trigger obligations beyond those arising from state legislative choices. In the words of the Supreme Court, it is parents who have a greater claim to authority as to the task of preparing children for such “additional obligations.”<sup>372</sup> Given the importance of integrating values and morals into education in sexuality—and the starkly different values which may be promoted—choosing which values to instill clearly falls within the natural and unalienable rights of parents.

Because parents and families are competent to provide education in sexuality and can more effectively provide truly comprehensive education in sexuality, the State should not—without strong reason—assume this family function. To do so demeans the dignity of the family and interferes with the right of citizens to pursue and achieve happiness.<sup>373</sup> To do so also necessarily lessens the State’s ability to carry out effectively those functions legitimately within the State’s realm of activity. Indeed, in the arena of public education, States are stretched thin, and most schools have been forced to make crucial changes that will negatively impact the effectiveness of education.<sup>374</sup> Returning responsibility for education in sexuality to parents and family will promote the well-being of society both from the bottom-up and the top-down.

That is not to say, however, that the State should have no role relating to education in sexuality. As stated in *Divini Illius Magistri*:

In general then it is the right and duty of the State to protect, according to the rules of right reason and faith, the moral and

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372. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

373. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that “Life, Liberty, and the Pursuit of Happiness” are “unalienable Rights”).

374. School districts across the country have, in recent years, implemented or plan to implement the following types of cost-cutting measures:

- Going to a four-day instructional week
- Laying off teachers and increasing class sizes
- Eliminating planning periods and assigning more classes
- Phasing out foreign language in the elementary and middle school grades
- Ending payments for professional development
- No longer paying for Masters Degrees
- Consolidating bus transportation routs [sic]
- Banning field trips and some extra-curricular programs
- Postponing text book purchases
- Instituting mandatory teacher furloughs
- Cutting Special Education program funding and staff
- Increasing class size and consolidating courses regardless of difficulty level

Michael Streich, *How the Recession Will Affect Education: Budget Cuts Will Further Weaken the Ability of Graduates to Compete*, SUITE101.COM (Mar. 9, 2010), <http://michael-streich.suite101.com/how-the-recession-will-affect-education-a211365#ixzz00v51iP6qW>.

religious education of youth, by removing public impediments that stand in the way. . . . It should begin by encouraging and assisting . . . the initiative and activity of the Church and the family, whose successes in this field have been clearly demonstrated by history and experience.<sup>375</sup>

Because some parents may feel unprepared to educate their children as to matters related to sexuality, state *assistance* to parents would be appropriate. How that assistance might be structured is a distinct issue requiring analysis beyond the scope of this article. Importantly, however, state *encroachment* into the realm protected by the parental right is suspect and subject to judicial scrutiny.<sup>376</sup>

### III. STATE INTERESTS DO NOT WARRANT ASSUMPTION OF THE DUTY OF FAMILY LIFE EDUCATION

Thus far, this article has demonstrated that the Supreme Court's understanding of a fundamental right of parents to direct and control the upbringing of their children and an application of the principle of subsidiarity both dictate that States should not usurp the parental responsibility to provide education in sexuality to their children. Both discussions, however, recognized a potential exception. The Supreme Court has recognized that, in appropriate circumstances, a sufficiently strong state interest in education may override the parental right. Similarly, the principle of subsidiarity would allow state action in an otherwise inappropriate realm in certain limited situations. Careful analysis, however, reveals that deviation from established principles and adoption of a school-based approach to education in sexuality cannot be justified.

#### *A. Infringement of the Parental Right Is Subject to Heightened and Refined Scrutiny*

The key Supreme Court decisions highlighted in Part II provide substantial guidance as to when state action may infringe upon the parental right to control the education and formation of their children.

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375. Pope Pius XI, *supra* note 270, at 49. The encyclical continues by noting that the State "should moreover supplement their work whenever this falls short of what is necessary, even by means of its own schools and institutions." *Id.* Other encyclicals and documents from official teaching bodies clearly reiterate, however, that education relating to sexuality belongs primarily to the family. See K.D. Whitehead, *Sex Education—New Vatican Guidelines*, EWTN, <http://www.ewtn.com/library/issues/se-nvg.txt> (last visited Feb. 13, 2012).

376. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977) (stating that "child rearing and education" are "among the decisions that an individual may make without unjustified government interference").

Specifically, the cases teach that, despite the admittedly strong state interest in the area of education generally, state action infringing on the parental right is never free from heightened judicial scrutiny. Again, a brief review of the cases is useful.

The state law at issue in *Meyer*<sup>377</sup> precluded a person from teaching any subject in public or private schools in any language other than English.<sup>378</sup> The State had argued that the law should be upheld because it promoted an interest in civic development and public safety, namely, an asserted interest in fostering a “homogeneous people with American ideals prepared readily to understand current discussions of civic matters.”<sup>379</sup> The Court rejected the argument as inadequate, given the “peace and domestic tranquility” of the time.<sup>380</sup>

*Pierce* involved a challenge to a state law requiring every parent or other person having control or charge or custody of children between the ages of eight and sixteen years to send them to public school.<sup>381</sup> Again, the State pointed to the importance of ensuring an adequate, standard education, and again the Court held that infringement of the parental right was unwarranted.<sup>382</sup> Here, the Court emphasized that the private schools taught—in addition to the systematic religious instruction, moral training, and military training—the subjects usually accessible in public schools.<sup>383</sup> The Court further emphasized that the private schools were not harmful to the public, that no evidence suggested that they had failed to provide a suitable education, and that no peculiar circumstances or emergencies existed that might warrant “extraordinary measures relative to primary education.”<sup>384</sup> The Court expressly stated that the traditional liberty at stake—the traditional right of parents as to education and formation of children—“excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”<sup>385</sup>

377. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

378. *Id.* at 400–01. The state supreme court had clarified that the statute at issue did not proscribe use of the “ancient or dead languages,” such as Latin, Greek, and Hebrew, but it clearly did ban teaching in alien languages such as German, French, Spanish, and Italian. *Id.* (internal quotation marks omitted).

379. *Id.* at 402. The State also suggested that the purpose of the law was “to protect the child’s health by limiting his mental activities.” *Id.* at 403. The Court rejected this assertion as being inconsistent with experience. *Id.*

380. *Id.* at 402.

381. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530 (1925). Some exceptions existed. *Id.* at 531.

382. *See id.* at 518–19.

383. *Id.* at 532–33.

384. *Id.* at 534.

385. *Id.* at 535. “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.*

*Yoder* similarly involved a challenge to a compulsory school attendance law, this one requiring attendance at a public or private school until age sixteen.<sup>386</sup> The Court in *Yoder* acknowledged the “high responsibility” of the State for the education of its citizens, stating that providing a public education “ranks at the very apex of the function of a State.”<sup>387</sup> Yet, the Court stressed that “a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests.”<sup>388</sup> The Court later explained that when the traditional parental right to control the religious upbringing of their children is at stake, a state law would be upheld only upon a showing by the State of “more than merely a ‘reasonable relation to some purpose within the competency of the State.’”<sup>389</sup> The law at issue in *Yoder* did not pass the judicial balancing test because the state requirement had a significant impact on the practice of the Amish religion and, further, because the state interest in education was not sufficiently strong given that the Amish practices ensure that children or adults leaving the community have skills and habits that generally would prevent them from being a burden to society.<sup>390</sup>

Lastly, the Court’s decision in *Prince* is particularly instructive.<sup>391</sup> In *Prince*, the Court upheld state enforcement of child labor laws as applied to a young girl offering Jehovah’s Witness materials on a public street with her legal custodian.<sup>392</sup> The parental right at stake in the case was particularly strong, given that both Mrs. Prince and the young girl earnestly believed that they had a religious duty to preach the Gospel by public distribution of the materials.<sup>393</sup> Nonetheless, the Court upheld the state law.<sup>394</sup> Importantly, the Court’s reasoning was multifaceted. That the state law promoted the State’s legitimate interest in child welfare was not alone determinative. Rather, the Court found that the infringement was warranted only

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

387. *Id.* at 213.

388. *Id.* at 214.

389. *Id.* at 233. Unfortunately, the scope of the Court’s statement was ambiguously qualified. The Court stated: “And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement.” *Id.* (emphasis added). At the outset of its analysis, the Court articulated two issues for consideration: whether the state law impermissibly interferes with the free exercise of religion and whether the “state interest [is] of sufficient magnitude to override the interest claiming protection.” *Id.* at 214.

390. *See id.* at 216–29.

391. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

392. *Id.* at 159, 162–63, 170–71.

393. *Id.* at 162–63.

394. *Id.* at 171.

because the law operated to protect youth from very real and potentially serious dangers associated with propagating religious, political, or other matters in the public arena;<sup>395</sup> further, these were dangers that parental supervision *could not* eliminate but which the state ban *could* eliminate.<sup>396</sup>

In this line of cases, then, the Court has set a high bar for any state intrusion into the realm reserved to parents for the education and formation of their children. State intrusion must be for the purpose of addressing some specific and serious need or harm.<sup>397</sup> A mere desire for a more homogeneous community or standardized education will not suffice where a need for uniformity does not exist. Education in the public context cannot be deemed superior to education at home if home schooling, generally, results in productive citizens able to understand civic matters. Further, even if state assumption of education is for the purpose of addressing some specific and serious need or harm, that need or harm must be such that it can be effectively remedied *only* by state action.<sup>398</sup> Stated another way, if the alternative of parental direction, control, or formation *could* effectively address the need or harm, state action cannot be justified.

This is, in some ways, akin to the analysis used in cases involving state infringement of other fundamental rights, namely, the compelling interest analysis. When a compelling interest analysis is triggered, the Court has made clear that “no showing merely of a rational relationship to some colorable state interest [will] suffice.”<sup>399</sup> Rather, justification depends on a two-pronged showing—first, that the law promotes a compelling state interest in a subject within the State’s power to regulate and, second, that the state action is narrowly tailored.<sup>400</sup> The essence of the second prong requires a showing that no alternative form of regulation exists that would promote the state interest with less infringement on the right.<sup>401</sup> When considered in light of the Court’s instructions as to the parental right and the particular context of education in sexuality, the second prong has a more direct focus. The issue is not whether some other less intrusive means exists for the State to promote its interest. Instead, the question is

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395. *Id.* at 169–70 (“The zealous though lawful exercise of the right to engage in propagandizing the community . . . may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children . . . to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury.”).

396. *Id.* at 170.

397. *See Prince*, 321 U.S. at 167.

398. *See id.* at 170.

399. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

400. *See United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 804 (2000).

401. *See id.*



simply whether parents can effectively address the need or harm or whether *only* the State can address the problem. When considered from the perspective of the compelling interest analysis, school-based education in sexuality cannot be justified.

*B. Given Parental Competency and Superiority in Matters of Family Life, the State Interest in Health and Welfare Cannot Justify Infringement of the Parental Right*

Several state interests relating to education in sexuality arise logically from the nature of the subject. The state interest in life itself is logically implicated given the number of pregnancies, including teen pregnancies, that have ended through abortion. Other interests logically connected include an interest in the health and well-being of our children and adolescents and responsible adulthood and parenthood. Properly framed, however, school-based education in sexuality is not warranted.

It is certainly true, of course, that the push to incorporate sex education into the schools has been driven, in part, by a specific and serious need or harm. The serious harms include short-term and long-term negative health consequences for adolescents who engage in sexual activity, such as STIs, infertility and other problems resulting from STIs, and the exponential and continual spreading of STIs;<sup>402</sup> teen pregnancies;<sup>403</sup> and the significant number of abortions by adolescents unwilling to accept full responsibilities for their actions.<sup>404</sup> It is clearly not true, however, that *only* the State can address this serious need or harm. The issue is not which type of school-based program is better or more effective: intellect-based or contraceptive-based programs. The issue is whether *only* the State can provide an education that is sufficiently *comprehensive* to be effective. For the reasons already detailed, however, not only are parents and family competent to provide effective education in sexuality, but many reasons suggest that the family context is the superior environment for the type of comprehensive program needed to be effective. Only parents and family can provide a truly age-appropriate, individualized,

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402. *Sexually Transmitted Diseases (STDs)*, NAT'L INST. ALLERGY & INFECTIOUS DISEASES, <http://www.niaid.nih.gov/topics/std/Pages/default.aspx> (last updated Nov. 29, 2011).

403. *Sexual Risk Behavior: HIV, STD, & Teen Pregnancy Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/HealthyYouth/sexualbehaviors/> (last updated July 12, 2011).

404. Karen Pazol et al., *Abortion Surveillance—United States, 2006*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 27, 2009), [http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5808a1.htm?s\\_cid=ss5808a1\\_e](http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5808a1.htm?s_cid=ss5808a1_e) (noting that adolescents, who are at the younger end of the reproductive spectrum, made up 16.5% of abortions in 2006).

and private education in sexuality, an education that is comprehensive from the perspective of appropriately integrating morals and values into any discussion of the use of human sexuality.

If this conclusion is so clear, a perplexing question is how sex education came to be so widely accepted as being within the domain of public elementary and secondary schools. The answer is that interests other than the health and well-being of adolescents were the real forces behind school-based sex education. In particular, two other asserted interests have played a central role in the school-based sex education movement: population control and access to contraceptives as a means of promoting women's rights. When carefully considered, both purported interests fall short of being able to override the parental right to control the education and formation of children.

*C. Interests in Population Control and Access to Contraceptives Do Not Warrant Encroachment of the Parental Right*

The connection between sex education in schools and the population control and birth control movements has been intensively researched and documented. Claire Chambers, author of *The SIECUS Circle: A Humanist Revolution*, was one of the first researchers to connect the many links between birth control as advocated by Planned Parenthood and its associated organizations, and the population control and sex education movements.<sup>405</sup> The SIECUS organization was formed in 1964 for the primary purpose of fostering population control through sex education in schools.<sup>406</sup> It remains a solid player in the arena of school-based sex education today.<sup>407</sup> The organization—and

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405. CHAMBERS, *supra* note 287, at 320–23, 326 (discussing Planned Parenthood's association with SIECUS and its origins from the American Birth Control League).

406. SIECUS stands for "Sex Information and Education Council of the United States." *Id.* at xiii. As originally formulated, the SIECUS program recommended "integrating coeducational sex education into as much of the curriculum as possible, preferably in all grades, K through 12, with situation ethics as the basis of morality, and sensitivity training as an 'educational tool.'" *Id.* at 41 (citing *An Open Letter from SIECUS*); see also HAROLD T. CHRISTENSEN, SIECUS STUDY GUIDE NO. 9: SEX, SCIENCE, AND VALUES 9, 21 (1976) (defining situational ethics, otherwise known as the relativistic position, as an ideal that "recognizes that acts have far-reaching consequences and seeks to understand the cause-and-effect relationships that apply under varying conditions. It is this rational-empirical understanding that provides the true basis for responsible decision-making."). SIECUS founder Lester Kirkendall emphasized the need to use public school sex education to foster population control in an issue of *The Humanist* magazine in 1965, in which he concluded: "Sex education is thus clearly tied in a socially significant way to family planning and population limitation and policy." CHAMBERS, *supra* note 287, at 13 (quoting Lester Kirkendall, *Sex Education: A Reappraisal*, HUMANIST, Spring 1965, at 78).

407. See SIECUS, 2010 ANNUAL REPORT: PROGRAM HIGHLIGHTS (2010), available at [http://www.siecus.org/\\_data/global/images/2010%20Annual%20Report.pdf](http://www.siecus.org/_data/global/images/2010%20Annual%20Report.pdf) (highlighting the organization's achievements in 2010 and its attempts to meet program goals).

its historical and enduring ability to solicit significant funding—are intimately linked to Planned Parenthood and the population control movement.<sup>408</sup> In their early decades, the population and birth control movements were dominated by influential proponents of humanist and eugenic philosophies.<sup>409</sup> Birth control emerged as the key vehicle to achieve their underlying goals, in part because of its purported alignment with women’s rights.<sup>410</sup> Researchers, including Angela Franks, author of *Margaret Sanger’s Eugenic Legacy: The Control of Female Fertility*, have raised significant questions regarding the impact of the contraceptive approach fostered by these “control” movements and whether the approach has actually impeded progress towards the genuine well-being of women.<sup>411</sup>

### *1. The Genesis of School-Based Sex Education: Population Control & Planned Parenthood*

The most direct reason for the inclusion of sex education in the public school curricula was an orchestrated concern over an impending population explosion.<sup>412</sup> The population control movement took hold in a serious way in the United States in the 1960s.<sup>413</sup> It took hold as a mainstream concern because the movement, which was predominantly grounded in economic concerns, appealed to the profit-based self-interest of the business community.<sup>414</sup> As Franks has highlighted, by the early 1970s, the profile of the average population-control supporter was “male, active in the business world, and more concerned with economics than biology.”<sup>415</sup> Businessmen were concerned with “preventing human and economic waste, . . . expanding consumption,

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408. *History*, SIECUS, <http://www.siecus.org/index.cfm?fuseaction=Page.viewPage&pageId=493&parentID=472> (last visited Feb. 13, 2012).

409. See FRANKS, *supra* note 310, at 207 (noting that Margaret Sanger, the founder of Planned Parenthood, was a proponent of eugenics).

410. CHAMBERS, *supra* note 287, at 78–80.

411. See FRANKS, *supra* note 310.

412. CHAMBERS, *supra* note 287, at 321–23.

413. RUTH DIXON-MUELLER, *POPULATION POLICY & WOMEN’S RIGHTS: TRANSFORMING REPRODUCTIVE CHOICE* 51 (1993). Federal and state funds for birth control programs began to emerge in the 1960s, coinciding “with the development of the birth control pill by Dr. John Rock of Planned Parenthood and others in 1963.” CHAMBERS, *supra* note 287, at 343.

414. FRANKS, *supra* note 310, at 150. Franks notes that “[b]ig foundations instituted by the wealthy have played a major role in the popularization of population and birth control.” *Id.* It has been an elitist preoccupation, a “club run by people with names such as Ford, Rockefeller, Scripps, Mellon, and Carnegie.” *Id.*

415. *Id.* at 212 (internal quotation marks omitted); see also DIXON-MUELLER, *supra* note 413, at 62 (noting the “men’s club” of intellectuals and professionals who formed an “interlocking network of politicians and experts” espousing the “demographic imperative”).

and . . . raising the quality of the American people.”<sup>416</sup> Economic concerns, however, translated into eugenic tendencies:<sup>417</sup> “In this eugenic view of humanity, people are seen merely as potential consumers, who are either of high quality (and thus able to spend more disposable income) or are waste products, with no value to a society that regards only the economic worth of the individual.”<sup>418</sup> Birth control emerged as a means to a desired end of the population control movement; it was “a means of increasing the general standard of living and, thus, [was] an ‘effective means’ for ‘expanding consumption’ and keeping foreign markets open, as well as a way of reducing taxes due to lessened welfare costs at home.”<sup>419</sup>

The puzzle was, of course, how to convert mainstream America into supporters of birth control. The key was to create a perception of a need for population control. That perception was generated over a number of years through the concerted efforts of the population control movement and the federal government.<sup>420</sup> The Population Crisis Committee was formed in 1965, and funded by the Rockefeller Foundation.<sup>421</sup> The purpose of the Committee was “[t]o bring forcefully to the attention of all Americans and the various agencies of government the population crisis which exists now in many parts of the world and in some parts of the U.S.”<sup>422</sup> In 1965, President Johnson also convened “a White House Conference on International Cooperation, which included a Panel on Population.”<sup>423</sup> As a panel participant, John D. Rockefeller III noted:

Population stabilization at this point in history is a necessary means to the enhancement and enrichment of human life . . . the big problem is to convince leaders that their peoples are ready to accept it as such. . . . [W]e are probably the last generation for which family planning can be a voluntary choice.<sup>424</sup>

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416. FRANKS, *supra* note 310, at 206 (internal quotation marks omitted).

417. *See id.*

418. *Id.*

419. *Id.*; *see also* ANN FARMER, BY THEIR FRUITS: EUGENICS, POPULATION CONTROL, AND THE ABORTION CAMPAIGN (2008) (theorizing that eugenics was the primary motivator behind the English abortion rights movement).

420. CHAMBERS, *supra* note 287, at 335.

421. *Id.* The Population Crisis Committee, in turn, was a major provider of funds for International Planned Parenthood Foundation and was also instrumental in establishing an Office of Population within the U.S. Agency for International Development (USAID) and the United Nations Fund for Population Activities (UNFPA). *Id.*

422. *Id.* (quoting ENCYCLOPEDIA OF ASSOCIATIONS).

423. *Id.* at 343.

424. *Id.* at 343–44 (footnote omitted) (quoting Mary Morain, *Panel on Population, HUMANIST*, Mar.–Apr. 1966, at 51).

In 1967, Congress got involved by allocating some \$50 million for population and/or family planning.<sup>425</sup> In 1968, the Johnson administration appointed a Committee on Population and Family Planning, of which John D. Rockefeller III served as co-chair.<sup>426</sup> Committee members included persons from Planned Parenthood, SIECUS, and humanists involved in the population control movement.<sup>427</sup> More substantial funding soon followed.<sup>428</sup> The Tydings Bill, sponsored and supported by population control advocates Planned Parenthood and SIECUS, was signed into law by President Nixon on December 24, 1970, as the Family Planning Services and Population Research Act of 1970.<sup>429</sup> The Act authorized \$382 million for family planning services, population research, and population education and information.<sup>430</sup>

President Nixon in 1969 also called for a special commission on population growth.<sup>431</sup> Congress responded in 1970 by passing P.L. 91-213, establishing a Presidential Commission on Population Growth and the American Future.<sup>432</sup> Soon thereafter, President Johnson appointed John D. Rockefeller III as Commission Chairman.<sup>433</sup> The Commission submitted its final report to President Nixon on March 27, 1972, which included more than sixty recommendations for action at the federal, state, and local levels.<sup>434</sup> Several recommendations were related to sex education in public schools and to the agenda of the contraceptive-based approach.<sup>435</sup> For example, the Commission recommended that legislatures assist schools in establishing population education in school curriculums,<sup>436</sup> “[t]hat abortion, sterilization, and contraceptive services and information be made available to all Americans”,<sup>437</sup> that “abortion be specifically included in comprehensive health insurance benefits, both public [governmental] and

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425. *Id.* at 344; see also DIXON-MUELLER, *supra* note 413, at 62–63 (explaining the congressional hearings in 1965 in which a parade of experts advocated for expansion of contraception services).

426. CHAMBERS, *supra* note 287, at 344.

427. *Id.* at 348–49. The Rockefeller Foundation substantially funded efforts to promote the Humanist philosophy of John Dewey and other Humanist-oriented institutions. *Id.* at 348. Rockefeller’s humanist perspective is expressly revealed in the book, *The Second American Revolution*. *Id.* In this book, Rockefeller called for a society in which “humanistic values predominate.” *Id.* (internal quotation marks omitted). The Rockefeller Brothers Fund also supported Worldwatch Institute, which was organized by Humanist Lester R. Brown, a signer of *Humanist Manifesto II*. *Id.*

428. *Id.* at 345.

429. *Id.* at 346.

430. *Id.* at 346.

431. *Id.* at 347.

432. CHAMBERS, *supra* note 287, at 347.

433. *Id.*

434. *Id.* at 354.

435. *Id.* at 355.

436. *Id.*

437. *Id.*

private”;<sup>438</sup> “that federal, state, and local governments [fund] abortion services”;<sup>439</sup> “[t]hat minors be given access to abortion, sterilization, and contraceptive services and information without the consent of parents or guardians”;<sup>440</sup> “[t]hat sex education be available to all through community organizations, the media, and especially the schools”;<sup>441</sup> and “that funds be given to the National Institute of Mental Health ‘to support the development of a variety of model programs in human sexuality.’”<sup>442</sup>

A central premise of the push to incorporate sex education into the schools was the importance of separating children from the influence of their parents.<sup>443</sup> To the population controllers, the ordinary American family did not understand the problem, let alone the way to solve the problem.<sup>444</sup> To help generate acceptance on main streets throughout the country, the Population Crisis Committee was a key sponsor of the April 30, 1972 special supplement to the *New York Sunday Times* titled *Population—The U.S. Problem, The World Crisis*.<sup>445</sup> The supplement presented data from the U.S. Commission on Population Growth and the American Future and called on governments to adopt a joint comprehensive long-term population policy to be coordinated under United Nations agencies.<sup>446</sup> Several events laid the groundwork for this major media presentation of the issue,

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438. CHAMBERS, *supra* note 287, at 355 (alteration in original) (internal quotation marks omitted).

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* The Commission’s recommendations complemented earlier recommendations stemming from the White House Conference on Youth in 1971. The Conference advocated that sex education should not be confined solely to reproductive physiology, “but should revolve around family life and the inculcation of moral responsibility *as it relates to the future consequences of population growth and control, and family planning.*” K. D. WHITEHEAD, AGENDA FOR THE “SEXUAL REVOLUTION”: ABORTION, CONTRACEPTION, SEX EDUCATION AND RELATED EVILS 62 (1981) (internal quotation marks omitted) (citing WHITE HOUSE CONFERENCE ON YOUTH, REPORT OF THE WHITE HOUSE CONFERENCE ON YOUTH 114 (1971)). Indeed, Dr. Alan Guttmacher, head of Planned Parenthood, at a testimonial dinner in May 1973 in Washington D.C., explained that the only avenue Planned Parenthood and its allies could travel to win the battle for elective abortion was sex education. *Id.* at 59–60 (citing the May 3, 1973 issue of the *Washington Star-News*).

443. GRANT, *supra* note 296, at 109.

444. As explained by Dixon-Mueller, the interlocking network of politicians and professionals found in foundations, universities, legislatures, and government agencies—the network of purported experts and intellectuals who comprised the backbone of the control movements—exhibited a type of “men’s club” mentality. DIXON-MUELLER, *supra* note 413, at 62.

445. CHAMBERS, *supra* note 287, at 335. For a news item highlighting the *Times* supplement, see *New York Times Issue Spotlights Population*, 8 POPULATION CRISIS, July 1972, at 1, 1, available at <http://www.womenshealthinwomenshands.org/PDFs/PopulationCrises.pdf>.

446. CHAMBERS, *supra* note 287, at 335.



and the supplement was distributed nationwide, including to teachers for use in school.<sup>447</sup>

By the early 1970s, the sex education movement was successfully launched and, with the increase in federal funding and the infusion of funds from foundations backed by wealthy population control advocates, Planned Parenthood and SIECUS stepped in to provide the recommended “information” and “services.”<sup>448</sup> Planned Parenthood and SIECUS were ready to step in because of a long-standing association between the movements, an association stemming primarily from the fact that the same people were actively involved in organizations of both movements.<sup>449</sup> The birth control and population control movements tended to be dominated by persons professing humanist and eugenic philosophies; this was a small but growing cohort of people, with many in high places.<sup>450</sup> As explained by Franks, “by virtue of a shared eugenic ideology of control—professional eugenicists, birth-control advocates, and population controllers constitute a single control movement with a near identity of interest.”<sup>451</sup>

Additionally, however, the two movements had strategic synergy. As already explained, the population control movement saw birth control as an essential means to its goals and began promoting and funding many Planned Parenthood activities.<sup>452</sup> At the same time, understanding the value of having male leaders—in terms of having some greater influence on policy making and funding decisions—Planned Parenthood made a strategic decision to use the *manpower* of the population control movement to further its goal.<sup>453</sup> Planned Parenthood was able to promote itself while also promoting the population control movement. Franks has documented how Planned

447. *Id.* at 335–36.

448. *E.g., id.* at 335–36 (sending, for example, sex education guides to teachers).

449. *Id.*

450. See FARMER, *supra* note 419, at 1–13 (explaining the links between Malthusianism, eugenics, and population control).

The history of eugenics is one of a reciprocal involvement of science and politics . . . beginning with two scientific theories, evolutionary theory and its complement, the theory of human heredity. . . . They delineated and helped to focus political concerns about population policy and control. Scientists used eugenics as a vehicle for their political convictions and social biases, just as politicians used its scientific framework, sketchy as it was, to advance their particular causes.

*Id.* at 6 (quoting Peter Weingart, *German Eugenics Between Science and Politics*, OSIRIS, 1989, at 260, 260).

451. FRANKS, *supra* note 310, at 146. The goal, of course, was to instill the population control ethos beyond the central cohort of actors. That they were successful is illustrated, in part, by their success in influencing a number of Catholic scholars. See, e.g., JOHN A. O'BRIEN, *FAMILY PLANNING IN AN EXPLODING POPULATION* (1968) (calling for a reconsideration of Catholic teaching on the issue of birth control).

452. See CHAMBERS, *supra* note 287, at 336–37.

453. FRANKS, *supra* note 310, at 206.

Parenthood literature often quoted or reprinted speeches made by male leaders in business, economics, and government.<sup>454</sup> For example, she highlights a Planned Parenthood pamphlet entitled *Citizen Responsibility in the Population Crisis*, which reprinted a speech by Marriner S. Eccles, in which he “urged the business community ‘in its own enlightened self-interest, strongly [to] support this cause both morally and financially. The prevailing notions that surging populations guarantee increasing profits is a fallacy . . . Capitalism wherever it may be cannot expect to survive as an island of abundance in a sea of poverty.’”<sup>455</sup> Planned Parenthood worked hard to send the message that “population growth is bad for business, but donating to Planned Parenthood is good for the bottom line.”<sup>456</sup> Indeed, Planned Parenthood was marketed as an essential aspect of health and welfare programs, especially from the perspective of preventing the “over-proliferation” of certain types of people: the mentally ill, juvenile delinquents, and the physically disabled.<sup>457</sup>

Strong political and economic forces, then, were behind the movement to get sex education into the school setting. Forces grounded in ideologies are far removed from any genuine concern for the health or welfare of adolescents. Proponents of the population and birth control movements wanted sex education in the schools—away from parents—to effectively inculcate their message about having smaller families through use of contraception and abortion services.<sup>458</sup> Their entire agenda hinged on producing future generations of Americans thoroughly and successfully indoctrinated with their messages. The evidence and ideologies underlying both movements have become suspect. Assuming that policy makers in the 1960s and 1970s may have had some legitimate grounds for the initial decisions to move to school-based sex education, it is disingenuous to argue that a sufficient basis exists today. Substantial counter-evidence has been brought to light that renders any further encroachment of the parental right unwarranted.

## *2. Population Statistics Undermine the Need for Population Control Policies*

During the period when the population control movement was making headway in terms of spreading its message and securing

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454. *Id.* at 210.

455. *Id.* (alteration in original) (quoting Marriner S. Eccles, *Citizen Responsibility in the Population Crisis* (May 11, 1961)).

456. *Id.*

457. *Id.* at 206–07.

458. GRANT, *supra* note 296, at 109.

federal and state funding and support, some in the scientific community opposed the idea espoused by *The New York Times* supplement that a “crisis” stemming from population explosion was looming. In September of 1974, two years after the release of the supplement, *Scientific American* published a special issue discussing the likelihood that demographers would witness stabilizing population due to a transition from the traditionally higher birth and death rates of the past to much lower birth and death rates associated with modern societies.<sup>459</sup> Recent statistics compiled by the United Nations Population Division have confirmed the validity of the predicted trend.<sup>460</sup> From this perspective, the data would suggest that a population decline would emerge as the real concern.<sup>461</sup> Rather than a population explosion, many demographers today point to a population implosion.<sup>462</sup>

Population declines in particular regions of the world have been apparent for some time. European demographers began noticing a downward trend in the 1990s<sup>463</sup> and recent studies have confirmed the alarming nature of the statistics. The figure of 2.1 children per woman is widely considered to be the replacement birth rate necessary to maintain a country’s current population level.<sup>464</sup> Yet, researchers have determined that birthrates in southern and eastern Europe have dropped below 1.3.<sup>465</sup> The researchers conclude that at that rate—the “lowest-low”—a country’s population loss would be devastating.<sup>466</sup> Demographers are now predicting similar scenarios on a broader, worldwide scale. Indeed, it is estimated that 47% of the world’s population lives in countries where the fertility rate has fallen below the replacement rate.<sup>467</sup> Based on United Nations’ data, demographers propose that the world’s population will peak within thirty to forty years and then begin an indefinite decline.<sup>468</sup> More specifically, the

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459. Max Singer, *The Population Surprise*, ATLANTIC MONTHLY, Aug. 1999, at 22, 22.

460. STEVEN W. MOSHER, POPULATION CONTROL: REAL COSTS, ILLUSORY BENEFITS ix–x (2008).

461. *Id.* at ix–x.

462. *Id.* at 6.

463. Russell Shorto, *No Babies?*, N.Y. TIMES, June 29, 2008, <http://www.nytimes.com/2008/06/29/magazine/29Birth-t.html?pagewanted=all>.

464. *Id.*

465. *Id.* (citing a 2002 study by social scientists Hans-Peter Kohler, José Antonio Ortega, and Francesco Billari); see also MOSHER, *supra* note 460, at 8 (explaining that the total fertility rate for Europe currently averages 1.4 children per woman, meaning that “the current population of 728 million will plunge to only 557 million by the year 2050, a drop similar in magnitude to that occurring during the Black Death”).

466. Shorto, *supra* note 463 (internal quotation marks omitted).

467. U.N. Dep’t of Econ. & Soc. Affairs, Population Div., *World Population Prospects: The 2008 Revision*, xi, U.N. Doc. ESA/P/WP.210 (2009).

468. MOSHER, *supra* note 460, at 6.

data and assumptions suggest that it is very possible that by 2040, the world's population will peak at around 7.6 billion people (just 1/6 more than the number the planet currently supports) and then begin shrinking, slowly at first but then accelerating.<sup>469</sup> According to Steven Mosher, President of Population Research Institute, the population will shrink back to current levels by 2082, and then shrink to under five billion by the turn of the next century.<sup>470</sup>

The statistics that purportedly supported the population “explosion” concern of the 1960s and 1970s were based on the rapid increase in population during the past two centuries.<sup>471</sup> That increase was due primarily to lower death rates associated with an increased worldwide life expectancy from around thirty to around sixty-two.<sup>472</sup> During that time, the population was relatively young with more mothers in each generation and fewer deaths than births.<sup>473</sup> The result was indeed a significant jump in world population. But, because there is a limit to increases in life expectancy,<sup>474</sup> no good reason ever existed to assume that the population would continue to increase at the past high rate. Further, because worldwide life expectancy is not likely to exceed age eighty-five, well over three-fifths of the possible increase has been attained.<sup>475</sup> Additionally, birth rates—even during the time of the “explosion”—had been falling;<sup>476</sup> this is true even for the United States, except for the brief period of the “baby boom.”<sup>477</sup>

Despite the growing consensus that the real crisis is the emerging underpopulation, the economically minded population control movement is alive and well.<sup>478</sup> Not unexpectedly—given its bureaucratic

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469. *Id.*

470. *Id.* It is estimated that the world population could shrink by roughly 25% with each successive generation. Nicholas Eberstadt, *World Population Implosion?*, PUB. INT., Fall 1997, at 3, 9. These numbers are consistent with data and assumptions found in the United Nations' *World Population Prospects: The 2008 Revision Population Database*. See U.N. Dep't of Econ. & Soc. Affairs, *supra* note 467, at ix–xiii.

471. Singer, *supra* note 459, at 24.

472. *Id.*

473. *Id.*

474. *See id.*

475. *Id.*

476. *Id.*

477. Singer, *supra* note 459, at 24.

478. For example, The Population Research Institute reported that the United States' Science and Technology Advisor, Nina Fedoroff, holds the extreme view that humans are the sole cause of climate change and as saying that there “are probably already too many people on the planet.” Steven W. Mosher, *April 07—Be Afraid, Be Very, Very Afraid: The Population Bomb Is About to Go Off (Again)*, POPULATION RES. INST. (Apr. 7, 2009), <http://pop.org/content/april-07-be-afraid-be-very-very-afraid-the-population-bomb-is-about-to-go-off-again-954>; *see also* *Contraception Is “Greenest” Technology*, POPULATION MATTERS (Sept. 9, 2009), <http://populationmatters.org/2009/press/contraception-greenest-technology> (promoting contraception as the latest in green technology). The Optimum Population Trust funded a study conducted by the London School of Economics which claimed that

mission—the movement is sustained by the United Nations Population Division. When compiling its data and its “world population prospects,” the Division produces data based on different underlying assumptions relating to fertility, mortality, and international migration.<sup>479</sup> The fertility assumptions are considered the most crucial.<sup>480</sup> In its press releases, the Division highlights projections calculated using the medium fertility assumption.<sup>481</sup> These projections are very different from those described in the preceding paragraphs. For example, the March 2009 press release proclaims that the world population will reach 7 billion in early 2012 and “surpass 9 billion by 2050.”<sup>482</sup> The release predicts minimal population changes in the more developed regions, but the release also acknowledges that the population would decline were it not for projected net migration from developing countries.<sup>483</sup> In addition, the release notes increasing “aging” of the population and states that this is due to declining fertility.<sup>484</sup> The release nonetheless emphasizes the need for continuing population control primarily by continuing to reduce the fertility of the less developed regions.<sup>485</sup> According to the release,

fertility in the less developed regions as a whole is expected to drop from 2.73 children per woman in 2005–2010 to 2.05 in 2045–2050. The reduction projected for the group of 49 least developed countries is even steeper: from 4.39 children per woman to 2.41 children per woman. To achieve such reductions, it is essential that access to family planning expands, particularly in the least developed countries. . . . The *urgency* of realizing the projected reductions of fertility is brought into focus by considering that, if fertility were to remain constant at the levels estimated for 2005–2010, the population of the less developed regions would increase to 9.8 billion in 2050 instead of the 7.9 billion projected by assuming that fertility declines. That is, without further reductions of fertility, the *world population could increase* by nearly twice as much as currently expected.<sup>486</sup>

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“‘considered purely as a method of reducing future CO2 emissions’, family planning is more cost-effective than leading low-carbon technologies.” *Id.*

479. U.N. Dep’t of Econ. & Soc. Affairs, *supra* note 467, at 20.

480. *See id.* at 24 (noting that of the eight projection variants included in the 2008 projections, five differed only with respect to the level of fertility).

481. Press Release, U.N. Population Div., World Population to Exceed 9 Billion by 2050 (Mar. 11, 2009), *available at* [http://www.un.org/esa/population/publications/wpp2008/press\\_release.pdf](http://www.un.org/esa/population/publications/wpp2008/press_release.pdf).

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.* (emphasis added).

The Division's press releases are misleading and, thus, help to sustain and fuel the population control movement in two key ways: other medium variant data suggests that a continued focus on population control is unwarranted, and, further, use of the medium variant data itself is unwarranted.

Even under the medium variant projections, it is clear that the aging of the population is emerging as a real crisis. The data reveals that, of the forty-five developed countries with at least 100,000 inhabitants, all of them had below-replacement levels of fertility in 2005–2010, and twenty-five of them had fertility levels below 1.5 children per woman.<sup>487</sup> In the developed countries, the number of older persons will be more than twice the number of children under age fifteen by 2050.<sup>488</sup> Further, in the developing countries, thirty-eight had below-replacement levels in 2005–2010.<sup>489</sup> The Executive Summary states that the majority of developing countries are “poised to enter a period of rapid population ageing.”<sup>490</sup> The summary states that, by 2050, 79% of persons aged sixty and older will live in the less developed regions of the world.<sup>491</sup> In addition, it states that 69% of the “oldest-old” (persons aged 80 years or older) will live in developing countries.<sup>492</sup>

For many demographers, these numbers reveal the real population crisis: the combination of cascading birth rates and skyrocketing aging populations will cause economies to stagnate from lack of workers and consumers, and it is precisely the less developed regions of the world that will have fewer resources available to cope with the problem.<sup>493</sup> Importantly, this population crisis exists largely because of the efforts of United States agencies operating under the influence of the population control movement.<sup>494</sup> During the same years that the movement was active in garnering support within the United States and getting sex education into the schools to serve its agenda, the movement was also successfully influencing federal international policies. The Foreign Assistance Act of 1961 designated population

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487. U.N. Dep't of Econ. & Soc. Affairs, *supra* note 467, at xi.

488. *Id.* at x.

489. *Id.* at xi.

490. *Id.* at x.

491. *Id.*

492. *Id.* at x–xi.

493. MOSHER, *supra* note 460, at 258–59; *see also id.* at 243, 248, (giving a useful explanation of (1) how the increasingly discredited Coale-Hoover economic model prompted economists and businesses to equate population control to profits in the later half of the twentieth century and (2) the emerging recognition that prosperity is linked to growing populations).

494. *See* CHAMBERS, *supra* note 287, at 335 (discussing how the population control movement focused officials' attention on overpopulation even though the real crisis was underpopulation).



control as a key determinate of foreign development assistance.<sup>495</sup> The legislation prescribed that “[a]ll appropriate activities proposed for financing . . . shall be designed to build motivation for smaller families through modification of economic and social conditions supportive of the desire for large families . . . .”<sup>496</sup> As explained by Mosher, U.S. aid to foreign countries requires governments both to agree to control population growth and to accept programs that are consciously designed to shrink family size and reduce fertility rates.<sup>497</sup>

The Division’s press releases are also misleading because strong reasons suggest that projections based on the Division’s low variant data are more realistic. Steven Mosher explains:

The “low variant” projection, which has global fertility falling gradually to 1.35, seems preferable for a host of reasons. First and foremost, it has been historically the most accurate. For two decades and more, the low variant has been a better predictor of population growth. Second, the low variant accurately reflects the fertility rates in dozens of developed countries around the globe. Fertility rates between 1.1 and 1.6 are typical of post-modern societies, even those with strong pro-natal policies. . . . The “low variant” makes the intuitively reasonable assumption that, as additional nations modernize, they will behave demographically like modern nations. Finally, the only effective counter to falling fertility . . . is strong religious faith, combined with a tax structure that completely shelters young couples from taxes. But religious faith . . . has long been on the wane. And taxes are on the rise—in part to pay for an increasing number of elderly.<sup>498</sup>

These reasons are persuasive. Indeed, economists tend to agree that development itself is the most effective contraception.<sup>499</sup> Falling fertility rates will continue, even without aggressive promotion of contraceptive-based family planning. As such, use of the low variant data makes sense.

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495. MOSHER, *supra* note 460, at 39.

496. *Id.* (quoting H.R. COMM. ON INT’L RELATIONS & S. COMM. ON FOREIGN RELATIONS, 109TH CONG., LEGISLATION ON FOREIGN RELATIONS THROUGH 2005 45 (Comm. Print 2006)).

497. *Id.* at 45. Mosher explains that George H.W. Bush, who headed the special Republican Task Force on Population and Earth Resources in the late 1960s, wrote that he was “impressed by the arguments . . . that economic development overseas would be a miserable failure unless the developing countries . . . control[led] fertility.”*Id.* (alteration in original) (quoting George H.W. Bush, *Forward to WORLD POPULATION CRISIS: THE UNITED STATES RESPONSE* (Phyllis Tilson Piotrow ed., 1973)) (internal quotation marks omitted).

498. MOSHER, *supra* note 460, at 7.

499. *Id.* at 250 (noting that factors found to be closely related to reduced fertility include those closely related to development such as urbanization, industrialization, and female participation in the work force).

The Division's low variant projections readily support population implosion predictions. Even in the United States, the fertility rate has stagnated at or slightly below replacement level.<sup>500</sup> The crisis is somewhat less obvious in the United States because of immigration levels.<sup>501</sup> Researchers, however, have acknowledged that immigrants "will not prevent the long-run aging of the population" in the United States unless annual immigration levels increase tenfold;<sup>502</sup> "In 2011, . . . the first baby boomers will turn 65 years old[, and] [t]he growth of the older population will accelerate markedly."<sup>503</sup>

Although legitimate concerns exist about distributions of populations and the need to care for hunger and disease that is prevalent<sup>504</sup>—specially in some areas of Third World populations—it is simply false to assert that the need for population control can justify state assumption of the parental right and duty relating to education in sexuality and family life. Mosher urges the federal government to eliminate its many policies that are grounded in mistaken views as to the need for population control and to recognize the importance of pro-natal policies.<sup>505</sup> A return to a parent-centered approach to sex education would be an important component of the shift in mindset and action, especially if state assistance to parents is designed—in part—to help parents and adolescents appreciate the extent to which a contraceptive-based approach to sexuality may lead to loss of fertility.

### *3. Genuine Concern for Women's Health and Well-Being Undermines the Contraceptive Approach*

As explained, the alliance of Planned Parenthood with the population control movement enabled Planned Parenthood to move into the mainstream of American culture.<sup>506</sup> This occurred part and parcel

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500. U.N. Dep't of Econ. & Soc. Affairs, Population Div., Population Aging in the United States: Retirement, Reform, and Reality, 2–3, U.N. Doc. UN/POP/PRA/2000/18 (Aug. 15, 2000) (by Judith Treas) (noting that "Americans have not experienced fertility markedly below replacement levels" but U.S. fertility rates are substantially lower than the levels experienced during the 1947–65 baby boom).

501. *See id.* at 2.

502. *Id.*

503. *Id.* at 3.

504. *See* U.N. Dep't of Econ. & Soc. Affairs, *supra* note 467, at xii.

505. MOSHER, *supra* note 460, at 257–58 (advocating the creation of policies designed to dismantle the institutions, policies, and programs that served the twentieth century population miscalculations).

506. The birth control movement's adoption of the name "Planned Parenthood" in 1942 was an early and deliberate step to enable its movement into the mainstream. *See* DIXON-MUELLER, *supra* note 413, at 41–42 (explaining that the concepts of "planned parenthood" and "family planning" suggested an ideology of strengthening the family unit, rather than that of freeing women).

with the women's movement of the twentieth century.<sup>507</sup> As birth control became more accepted, Planned Parenthood in the United States worked hard to push its agenda.<sup>508</sup> Today, Planned Parenthood's ethos of the importance of ready information about, and access to, contraceptives and abortion is heavily promoted as a necessary means for the advancement of women and the protection of women's reproductive rights.<sup>509</sup>

The notion that birth control is necessary to promote women's rights flows largely from the ideology of Planned Parenthood's founder, Margaret Sanger.<sup>510</sup> In addition to being part of the eugenics cohort of the early twentieth century, Sanger had a unique perspective on how women could better their lives.<sup>511</sup> In her book on Margaret Sanger and the ideologies promoted by Sanger, Franks points out that while other feminists of the era saw a link between feminine dignity and motherhood, Sanger's ideology sets up a model of opposition between a woman and her body.<sup>512</sup> As explained by Sanger in *Women and the New Race*, motherhood is oppressive, and the feminine spirit yearns for wholly voluntary motherhood and "fit" children.<sup>513</sup> Freed from unwanted children, women would be able to develop their feminine spirit.<sup>514</sup> While large families enslave women, women with few children are able to live well-rounded lives, have friends, pursue recreation, and become courted "comrades" to the men they choose.<sup>515</sup> Moreover, to Sanger, women owe a debt to society,<sup>516</sup> and her message included the idea that women have a duty to pursue the means to their freedom, namely birth control.<sup>517</sup> Sanger's message, therefore,

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507. See *History & Successes*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/about-us/who-we-are/history-and-successes.htm#Sanger> (last visited Feb. 13, 2012).

508. See *id.*

509. See *Mission*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/about-us/who-we-are/vision-4837.htm> (last visited Feb. 13, 2012).

510. See SANGER, *supra* note 76, at xlvi; MARGARET SANGER, *WOMEN AND THE NEW RACE* 226, 229 (Cosimo Classics 2005) (1920) [hereinafter SANGER, *WOMEN*].

511. See FRANKS, *supra* note 310, at 9; see also DIXON-MUELLER, *supra* note 413, at 36 (explaining that prior feminist movements saw contraception as yet another instance of subordination to the sexual desires of men).

512. See FRANKS, *supra* note 310, at 9.

513. See, e.g., SANGER, *WOMEN*, *supra* note 510, at 226–27 (declaring that motherhood must be "voluntary"). The eugenics aspect of Sanger's ideology envisioned not just healthy children, but fewer and better quality children. See FRANKS, *supra* note 310, at 11–12.

514. See SANGER, *WOMEN*, *supra* note 510, at 181.

515. *Id.* at 53–55.

516. *Id.* at 4–6.

517. See *id.* at 6, 8. To Sanger, women had "accepted" their function as "brood animals" and were, in a sense, responsible for the evils of the world by virtue of continuing to overpopulate the world. *Id.* at 2–3. "They went on breeding with staggering rapidity those numberless, undesired children who become the clogs and the destroyers of civilizations." *Id.* at 5.

was more heavy-handed than the mere idea of voluntary motherhood. Motherhood itself becomes a negative, especially as to large families or children with special needs.<sup>518</sup>

The less heavy-handed side of her message should, nonetheless, sound familiar. The basic message has been that women's lives in the past were unduly delimited by family responsibilities and deprived women of yearned-for opportunities; it also demanded that women have more control over their lives.<sup>519</sup> This basic message resonated with many women and, as the feminist movement of the twentieth century marched forward, women went along. Much good has resulted from the basic message. During the last half of the twentieth century, women created and pursued opportunities—in higher education, in employment, and in politics—and the ability to have more control over the birth of children has been an important factor in these achievements.<sup>520</sup> Yet, unbeknownst to the average woman, the message—and the *means* to achieve these advancements for women—became distorted by the heavy influence and activism of the population controllers.<sup>521</sup>

Contraception was central to Sanger's vision of the path to women's well-being.<sup>522</sup> Women could pay their debt to society only by limiting their reproductivity; only then would problems such as war, famine, and oppression of workers abate.<sup>523</sup> Only through voluntary motherhood would women be free and, thus, able to better the world.<sup>524</sup> Sanger wanted women to have information about, and ready access to, birth control.<sup>525</sup> She saw birth control as a "woman's problem" to be solved by women.<sup>526</sup> When Planned Parenthood allowed players in the population control movement to take the lead, however, Sanger's quest for an ideal means of birth control for women became heavily influenced by men who were concerned about the masses and cost-benefit formulas<sup>527</sup> and, frankly, taking control away from

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518. *Id.* at 57, 63–64. Indeed, Sanger characterizes large families as wicked and immoral and states that "[t]he most merciful thing that the large family does to one of its infant members is to kill it." *Id.* at 57, 63.

519. *See id.* at 227 ("She will become a full-rounded human being.").

520. *See, e.g.,* *Timeline of Legal History of Women in the United States: A Timeline of the Women's Rights Movement 1848–1998*, NAT'L WOMEN'S HIST. PROJECT, <http://www.legacy98.org/timeline.html> (last visited Feb. 13, 2012) (chronicling the history of women's rights during the twentieth century).

521. *See, e.g.,* CHAMBERS, *supra* note 287, at 326 (citing the Planned Parenthood presidency of Dr. Alan F. Guttmacher, a lecturer on population control).

522. *See* SANGER, WOMEN, *supra* note 510, at 181.

523. *Id.* at 6–8.

524. *See* SANGER, *supra* note 76, at 432–33; SANGER, WOMEN, *supra* note 510, at 226–34.

525. *See* SANGER, WOMEN, *supra* note 510, at 200.

526. *Id.* at 93, 100.

527. *See* FRANKS, *supra* note 310, at 204, 206.

women.<sup>528</sup> As the consequences of this shift in focus are becoming more evident, it is legitimate to question whether today's contraceptive approach to birth control genuinely promotes the well-being of women.

*a. Development of Contraceptives: Distorted by the Economic Interests of the Population Control Movement*

The alliance between Planned Parenthood and the population control movement resulted in the pursuit of a form of birth control without regard for the genuine health or well-being of women.<sup>529</sup> For members of the control movements, women's natural and healthy reproductive capabilities were (and are) viewed as a *problem* to be fixed as expeditiously as possible.<sup>530</sup> Government agencies, businessmen, and pharmaceutical researchers joined forces in an effort to find the "perfect contraception" to control the fertility of women.<sup>531</sup> From a male-dominated, management perspective, the perfect contraception is simple, long-lasting, and irremovable except by a medical professional.<sup>532</sup> Further, although women are fertile for only a limited and finite period per cycle and men are fertile at all times,<sup>533</sup> the focus was always on the need to find a chemical, device, or barrier that "would render a woman infertile day in and day out."<sup>534</sup> From that perspective, development of "the pill" was a real achievement.<sup>535</sup> Even

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528. *See id.* at 203–36 (discussing the increasing involvement of men in the birth control movement).

529. *See, e.g., id.* at 214–15 (describing the unsafe contraceptives on the market in the 1970s).

530. *Id.* at 204. Despite alternatives that would be less dangerous for women, population concerns and women's concerns about regulating births were pursued in the twentieth century by way of finding some technology that would repress women's natural and healthy reproductive capabilities. *See id.* at 218–19 (debating the benefits of the diaphragm, which does not change a woman's body chemistry, against birth control, which does change body chemistry). Women went along because of rhetoric trumpeting concerns about "unwanted" children and dangerous childbirth. *Id.* at 216. But, again, alternatives exist. *Id.* at 218.

531. *Id.* at 204 (internal quotation marks omitted).

532. *Id.*

533. Peter L. Rosenblatt, *Menstrual Cycle*, MERCK MANUAL HOME HEALTH HANDBOOK, [http://www.merckmanuals.com/home/womens\\_health\\_issues/biology\\_of\\_the\\_female\\_reproductive\\_system/menstrual\\_cycle.html](http://www.merckmanuals.com/home/womens_health_issues/biology_of_the_female_reproductive_system/menstrual_cycle.html) (last updated July 2007) (explaining that women are fertile for only twelve hours after the egg is released); *Sperm FAQ*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/sperm-and-semen-faq?page=2> (last updated Sept. 8, 2010) (stating that men are fertile throughout their entire lives).

534. FRANKS, *supra* note 310, at 222.

535. *Id.* at 218. Franks notes that Sanger hoped for the development of birth control methods "that will be so simple, so safe, so convenient and so cheap that the popularization of their use among poor and ignorant people will be a comparatively easy matter." *Id.* (internal quotation marks omitted). The pill was convenient and easy, but safety was another matter. *See id.* at 220–21. As Franks explains, for the population control movement, the effect of an additional child in the "over-populated" world outweighs the health risks of contraceptives to an individual woman: "Population control is an absolute value,

the pill, however, was not perfect because it did not render women infertile, day in and day out, without daily motivation,<sup>536</sup> and thus, the search continued, often with deliberate indifference to women's lives and health.<sup>537</sup>

Franks and others have detailed the multitude of abuses inflicted on women in the pursuit of a variety of contraceptives, especially upon poor women outside of the United States.<sup>538</sup> For example, in the crusade to develop the pill, researchers used mental patients at the Massachusetts State Hospital<sup>539</sup> and poor women in Puerto Rico as test subjects.<sup>540</sup> Other researchers recognized serious flaws in study designs in the 1950s. For example, safety was assumed, and the testing thus focused only on effectiveness; when noticeable side-effects emerged, concerns were dismissed.<sup>541</sup> Further, although fairly serious side-effects were documented in the 1960s—including fatal blood-clots, bloating, headaches and migraines, depression, weight gain, and ovarian cysts—FDA warnings did not emerge until after Senate hearings began in 1970.<sup>542</sup> Documented abuses relating to the pill continued internationally throughout the 1980s and 1990s.<sup>543</sup>

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trumping any other concern, even that of women's health." *Id.* at 216. For two of the primary researchers who developed the pill (John Rock and Gregory Pincus), demographic reduction was the driving motivation. *Id.* at 218.

536. *Id.* at 222 (noting the demographic imperative of high levels of continuous contraceptive practices); see also DIXON-MUELLER, *supra* note 413, at 48 (explaining the "inoculation mentality" of researchers and service delivery personnel, in mindset, "in which the best method for most women (especially the poor) is viewed as a single anti-pregnancy 'shot' such as an IUD insertion, injection, implant, or tubectomy").

537. FRANKS, *supra* note 310, at 221–32 (documenting the creation of new birth control devices such as the IUD and Norplant).

538. *E.g.*, *id.* at 217–21; see also MOSHER, *supra* note 460, at 121–154 (discussing Peru's sterilization campaign, which forced many women to undergo the unwanted procedure).

539. FRANKS, *supra* note 310, at 219. The plan was suggested by a friend of Sanger's, who noted that what the researchers "needed was a 'cage' of ovulating females to experiment with." *Id.* (quoting Letter from Katherine Dexter McCormick to Margaret Sanger (May 5, 1955) (internal quotation marks omitted); Memorandum from Katherine Dexter McCormick to Margaret Sanger (July 5, 1955) (internal quotation marks omitted)).

540. *Id.* at 217–21. Franks explains that Puerto Rico was targeted by researchers and the Rockefeller Foundation as early as the 1930s. *Id.* at 220. The process swung into full gear after an IPPF conference was held in San Juan in 1955. *Id.* The conference provided the opportunity for researchers to meet an American physician who subscribed to the population control ideology and who also worked in a large hospital that served the native population. *Id.* Field tests of oral hormonal contraceptives began in 1956, involving as test subjects women living in a housing development in a slum area called Rio Piedras. *Id.* at 220. Other clinical trials, which researched both pills and the IUD soon followed, and ultimately "involve[d] 1,700 women." *Id.* (footnote omitted).

541. *Id.* at 220–21 (quoting Dr. Herbert Ratner, editor of the journal *Child and Family*).

542. *Id.* at 221. In 1970, Senate hearings investigating the safety of the pill were held, chaired by Democrat Gaylord Nelson. *Id.* As a result, pharmaceutical companies were required to include with the pills FDA-written package inserts detailing potential side-effects. *Id.*

543. *Id.* at 221 (pointing to labeling that deviated significantly from the labeling in America (e.g., a package insert from an Indian company stating "there is no harm by this



In a similarly callous way, the Population Council later provided enormous funds for the development of the IUD, despite early evidence of dangers for women.<sup>544</sup> For example, reports of serious endometriosis and abnormal Pap smears emerged in the early 1960s, but the reports were ignored as insignificant.<sup>545</sup> Despite evidence of pregnancies occurring with the IUD in place—including ectopic pregnancies in one in twenty-three cases—and high rates of miscarriages in non-ectopic pregnancies, Planned Parenthood personnel and associated agencies continued to recommend its use and assert its safety.<sup>546</sup> Women's health was seriously jeopardized by the use of IUDs, yet its continued promotion was deemed the appropriate cost-benefit decision.<sup>547</sup> Indeed, as explained at the Population Council's First International Conference on Intra-Uterine Contraception:

[IUDs] are horrible things, they produce infection, they are outmoded and not worth using . . . [but] suppose one does develop an intrauterine infection and suppose she does end up with a hysterectomy and bilateral salpingoophorectomy [the removal of the ovaries and Fallopian tubes]? How serious is that for the particular patient and for the population of the world in general?

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pill”). USAID recommended that IPPF avoid use of the term “contraindications” and, instead, affirmatively encourage use by emphasizing that “risks of pregnancy are greater than the risks of the pill.” *Id.* Franks elsewhere highlighted the ideological bias in the repeated assertion by the control movement that pregnancy and childbirth is more risky than chemical contraceptives:

It is fallacious to assume that childbirth is always more dangerous than any contraception—especially given the toxic nature of [the pill and the IUD]. Such an assumption betrays an attitude that views the female reproductive system as haphazard, chaotic, alien, as if it does not quite work the way it ought, or as if it is not quite natural for the female body to bear children: some control, any control, is better than nothing. . . . [And, further,] it is assumed that the alternative to dangerous childbirthing conditions is not the logical opposite—namely, *safer* childbirthing conditions—but rather no childbirth at all, as guaranteed by a potentially unsafe contraceptive.

*Id.* at 216–17.

544. FRANKS, *supra* note 310, at 222. Franks details the Council's heavy support throughout the 1960s, and concludes that the Council can claim credit for the development of the IUD, but she credited Planned Parenthood for its widespread dissemination. *Id.*

545. *Id.* A doctor described the scarring of women's tissue in the test group in Puerto Rico as “horrendous.” *Id.* (internal quotation marks omitted) (citing Memorandum from Sheldon J. Segal (Oct. 1, 1963)). Nonetheless, a medical committee of the Planned Parenthood Federation of America claimed that there was “no scientific evidence of cancer,” and that IUDs “are both safe and effective.” *Id.* (quoting Memorandum from the Med. Comm. of the Planned Parenthood Fed'n (July 15, 1964); Memorandum from the Med. Comm. of the Planned Parenthood Fed'n (July 30, 1965) (internal quotation marks omitted)).

546. *Id.* at 223 (explaining that data showed that pregnancies occurred with the device in place 7.5% of the time with the stainless-steel ring, and that, despite the high rate of miscarriages, the medical committee advised Planned Parenthood entities to tell clients that the “baby is *never* affected”).

547. *See id.* at 216.

Not very . . . Perhaps the individual patient is expendable in the general scheme of things, particularly if the infection she acquires is sterilizing but not lethal.<sup>548</sup>

Similar abuses continued during the development of Norplant and Depo-Provera.<sup>549</sup> As with IUDs, these contraceptives are supported by the control movement because they “‘work without’ the ‘woman’s cooperation.’”<sup>550</sup> That is, once administered, they continually seep chemicals into a woman’s body for a set period of time.<sup>551</sup>

It is difficult to think that such egregious abuses would have occurred but for the distorting economic self-interest of the population control movement.<sup>552</sup> It is simply inconceivable that a movement genuinely grounded in women’s rights would have made the decisions that have been made in the development of today’s contraceptives. The overall situation was aptly summarized by Franks: “When what is at stake is the control of female fertility for demographic reasons, any inconvenient facts such as potential health risks to women have to be glossed over in public . . . [N]o pretense of empowering women

548. *Id.* at 225 (alteration in original) (citing BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL 213 (1995) (quoting statement of Dr. J. Robert Willson made in New York City in 1962)).

549. *Id.* at 226–32. Norplant was developed by the Population Council in 1967 and entails the implantation of six progestin-containing rods under a woman’s skin. *Id.* at 226. The rods are effective for five years. *Id.* The rods cannot be left in the body indefinitely and must be removed by a physician. *Id.* Depo-Provera is an injectable form of chemical contraceptive that was first tested in 1958 for treating miscarriages. *Id.* at 229–30. Its manufacturer, Upjohn, first sought approval for its use as a contraceptive in 1967. *Id.* at 230. Both drugs were tested largely in Third World countries, using seriously questionable (i.e., abusive) strategies. *Id.* at 227, 230. Unsurprisingly, Planned Parenthood entities have been heavily involved in the distribution of these contraceptives. *Id.* at 228, 232.

550. FRANKS, *supra* note 310, at 226.

551. *See id.* (stating that once implanted, Norplant prevents pregnancy for five years); *Depo-Provera: Quarterly Injection*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/preventingpregnancy/depoprovera.html> (last updated July 2003) (explaining how Depo-Provera need only be injected every eleven to thirteen weeks, but prevents pregnancy throughout that time).

552. *See FRANKS, supra* note 310, at 203–32. The Committee on Women, Population, & the Environment (CWPE) asserts a similar view. *See About CWPE*, COMM. ON WOMEN, POPULATION & ENV’T, <http://www.cwpe.org/about> (last visited Feb. 13, 2012). The CWPE is “a multiracial alliance of feminist community organizers, scholarly activists, and health practitioners committed to promoting the social and economic empowerment of women in a context of global peace and justice.” *Id.* The CWPE “[c]hallenge[s] the belief that population growth is the primary cause of environmental degradation, conflict, and growing poverty[.] . . . [w]ork[s] to provide a broader analysis that reflects the complexity of these issues” and “locates the true causes in a global economic system based on exploitation, profit, and consumerism, the structures of patriarchy and racism that underlie it, and the militarism that enforces and perpetuates it.” *Id.* The CWPE states that, “[b]y focusing on emerging political issues and alliances, we work to expose the human rights violations that follow from population-based analyses.” *Id.*

or safeguarding their health is put forward . . . .”<sup>553</sup> Furthermore, “women and girls, especially the poor, continue to suffer at the hands of an unchallenged misogyny that considers their reproductive powers inherently problematic, if not repugnant, and disposable for the sake of the ‘greater good.’”<sup>554</sup> The important point is that, without the distortions caused by the demographic and cost-benefit perspectives, other means for helping women and families to regulate births responsibly likely would have emerged. These means would be in line with the genuine health and well-being of women and, notably, more in line with Sanger’s own views—at least as set out in her early writings.

*b. Today’s Natural Family Planning Methods Are More Consistent with Sanger’s Views*

Despite Sanger’s close association with Planned Parenthood, SIECUS, and the population controllers, careful reading of Sanger’s early works reveals an important but overlooked point: the works strongly suggest that Sanger would reject today’s chemical and barrier contraceptive methods in favor of today’s highly effective natural family planning methods. This point further undermines the Planned Parenthood/population control perspective and, thus, undermines arguments for school-based sex education.

In *Women and the New Race* and a later publication titled *Happiness in Marriage*, Sanger laid out her argument for the need for birth control and its ideal characteristics.<sup>555</sup> As explained, Sanger viewed birth control as necessary to free women from the chains of bondage resulting from having children too early and too often in marriage.<sup>556</sup> But what does Sanger mean by the phrase “birth control”? Sanger makes it clear in *Women and the New Race* that she is advocating for a method that prevents conception. She explained:

If no children are desired, the meeting of the male sperm and the ovum must be prevented. When scientific means are employed to prevent this meeting, one is said to practice birth control. The means used is known as a contraceptive.

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553. FRANKS, *supra* note 310, at 225.

554. *Id.* at 235.

555. MARGARET SANGER, HAPPINESS IN MARRIAGE 207 (Maxwell Reprint Company 1926) [hereinafter SANGER, HAPPINESS] (citing finances, happiness, and health concerns as reasons married couples need birth control); SANGER, WOMEN, *supra* note 510, at 8 (arguing that women need birth control in order to escape involuntary motherhood so that they may become free and make full contributions to society).

556. SANGER, WOMEN, *supra* note 510, at 29.

If, however, a contraceptive is not used and the sperm meets the ovule and development begins, any attempt at removing it or stopping its further growth is called abortion.<sup>557</sup>

One of Sanger's key arguments in favor of contraceptives was that women throughout history have sought to limit family size,<sup>558</sup> and women have had three options: contraceptives, surgical abortion, or chemical abortion.<sup>559</sup> For all women—wealthy and poor alike—Sanger described surgical abortion as dangerous, requiring as much attention as the birth of a child and as involving serious long-term risks bearing on a woman's general health, such as infertility, or serious painful pelvic ailments.<sup>560</sup> She was even more negative about chemical abortions: "Keep away from drugs! Prevention is the solution of this problem."<sup>561</sup> To Sanger the choice was clear. Laws allowing information about and access to contraceptives—methods that prevent conception—would prevent the need for dangerous abortions.<sup>562</sup>

Sanger also had clear ideas about the type of preventative methods women should pursue. She noted that, ideally, birth control would be a matter of concern to both spouses.<sup>563</sup> Yet, Sanger was a realist and she concluded—at that time—that women will not truly be free unless women alone accept the responsibilities associated with birth control.<sup>564</sup> Sanger's discussion of birth control focused on practicability and reliability. On the practical side of things, she rejected as unrealistic absolute continence, i.e. abstinence, and continence except for those times when the couple desires to bring a child into the world.<sup>565</sup> She did not reject the use of continence with the "safe-period" method on practical grounds; indeed, she noted that such limited continence would "harm no one."<sup>566</sup> Rather, this approach was rejected due to concerns for its unreliability, because—based on information available to Sanger at that time—Sanger thought that "[f]or many women there is never any 'safe period.'"<sup>567</sup> She also

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557. *Id.* at 124.

558. *Id.* at 10.

559. *See id.* at 121, 126.

560. *Id.* at 124–26.

561. SANGER, HAPPINESS, *supra* note 555, at 214.

562. SANGER, WOMEN, *supra* note 76, at 128. Sanger reiterates in *Happiness in Marriage* this distinction between birth control and abortion: "The methods advised for birth control are not methods of abortion." SANGER, HAPPINESS, *supra* note 555, at 214.

563. SANGER, WOMEN, *supra* note 510, at 96.

564. *Id.* at 100.

565. *Id.* at 101–06.

566. *Id.* at 112 (internal quotation marks omitted). Continence during the "safe period" is a method in which women refrain from sex during the fertile period of their menstrual cycle. *See id.* at 113.

567. *Id.* at 112–13, 134.

described other methods known to be unreliable.<sup>568</sup> Sanger was unable to provide information about methods which, in her experience, do work because of laws banning the dissemination of such knowledge.<sup>569</sup> She informed her readers, however, that reliable methods exist and “can be used without injury either to the man or the woman,”<sup>570</sup> and she expressed her optimism that, as scientific expertise grows, “troublesome methods of the past [will] give way to the simpler, more convenient methods.”<sup>571</sup>

This, then, is what Sanger was after: a method that prevents the meeting of the sperm and the oocyte; that is reliable—especially for poor women; that will not cause injury to either partner; that is relatively simple to use; and that is within the control of women—although ideally both spouses would assume responsibility. Further, throughout her writings, it is clear that Sanger was genuinely concerned about the health and well-being of women, including the need for women to be respected as women.<sup>572</sup>

Notably, today’s natural family planning methods fit Sanger’s criteria better than any other method of birth control. Outside the circle of Planned Parenthood, SIECUS, and the population controllers, researchers have been concerned about negative effects of artificially suppressing the natural operation of a woman’s reproductive system.<sup>573</sup> These researchers have fine-tuned nature’s route to responsible regulation of births, namely, accurate identification of a woman’s fertile and infertile periods.<sup>574</sup> In contrast to reliability concerns associated with earlier natural methods, today’s natural method of preventing contraception is scientific and highly effective.<sup>575</sup> It is also safe and does not require chemicals, drugs, or devices.<sup>576</sup>

Today’s approach—called Natural Family Planning or Fertility Awareness—works in harmony with a woman’s natural cycle, helping her to pinpoint the limited period each cycle when she is fertile; it requires only a few moments of time each day to ascertain the stage

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568. *Id.* at 133–35 (describing the common practices of prolonged nursing and cold-water douching that are unreliable methods of pregnancy prevention).

569. SANGER, WOMEN, *supra* note 76, at 132.

570. *Id.*

571. *Id.* at 133.

572. *See, e.g., id.* at 100 (stating that society will respect motherhood only after birth control is available to women).

573. *See* WETZEL, *supra* note 52, at 102.

574. *Id.* at 103–04 (introducing three variations of the Fertility Awareness method in which women identify their fertile and infertile periods).

575. *Id.* at 104 (noting that the newer Fertility Awareness method is more reliable than the outdated Rhythm Method and that the Fertility Awareness method has a similar or higher rate of effectiveness than other methods of birth control).

576. *See id.* at 103–04, 107 (explaining that women need only utilize a tissue in order to examine their cervical fluid and stating that couples cannot blame devices in the event of pregnancy).

of the woman's cycle.<sup>577</sup> For example, the Symptothermal Method requires a woman to take her temperature each day and to assess regularly, throughout her cycle, the fluidity and elasticity of her cervical fluid in order to identify when ovulation most likely will occur.<sup>578</sup> Properly assessing the cervical fluid requires a certain level of discernment, so women work with physicians or other trainers at the outset to become adept at the process.<sup>579</sup> The characteristics of fluidity or elasticity are sufficiently distinctive that the average women can develop an expertise as to her cycle.<sup>580</sup> This is a skill that mothers can readily teach to daughters. Armed with the knowledge of when she is fertile, a woman can then refrain from sexual activity during this period or not, depending on whether she and her partner are willing to assume the responsibility for any child that may be conceived.

Importantly, today's Fertility Awareness methods are highly reliable. Recent studies have shown effectiveness rates from ninety-five to ninety-eight percent.<sup>581</sup> The impressive rate of effectiveness is due to the fact that the method does not hinge on the regularity of a woman's cycle, at least in terms of calendar days. Rather, the method focuses on identifying the few days immediately surrounding ovulation based on predictable signals tied to the natural—and highly intricate—operation of a woman's reproductive system,<sup>582</sup> an intricate system grossly distorted by today's chemical contraceptives.

577. *Id.* at 103 (demonstrating that a woman employing the Fertility Awareness method need only assess her body's signals while she is using the restroom).

578. *Id.* at 103–04 (stating that a certain amount of training is required before women can accurately use this method). Like taking a daily pill, this method requires some motivation, but the effort is hardly more than taking a daily pill. *See id.* at 104.

579. WETZEL, *supra* note 52, at 103–04 (stating that women need some training when beginning the Fertility Awareness method).

580. Research has identified the characteristics of so-called fertile and non-fertile cervical fluids. IVAF, Lesson 7: Biologic Signs of Ovulation 2 (on file with IVAF) [hereinafter Lesson 7]. The non-fertile fluid or mucus has a tight structure and impedes the passage of sperm into the genital tract. *Id.* at 3. Different types of fertile mucus exist, each contributing to the meeting of the oocyte and sperm. *Id.* at 2. The fertile mucus is usually elastic and transparent, and produces a feeling of wetness or slimness. *Id.* at 4. In contrast, the non-fertile mucus generally is opaque and has a gummy consistency. IVAF, Lesson 8: Fertility Awareness 3 (on file with IVAF). It sometimes does not make it to the genital opening, so women may experience a feeling of dryness. *Id.* The change from the non-fertile to fertile mucus should be accompanied by an elevation in body temperature of 0.2 to 0.4 degrees that continues until the menstrual period. Lesson 7, *supra*, at 4.

581. WETZEL, *supra* note 52, at 104 (discussing numerous empirical research studies).

582. Ovulation refers to the release of a mature oocyte from a woman's ovary, into the Fallopian tube. IVAF, Lesson 6: The Menstrual Cycle 6 (on file with IVAF). The oocyte remains in the tube waiting for the spermatozoid to come. *Id.* If sperm arrives, fertilization occurs and a new human life begins. *Id.* If no fertilization occurs, the oocyte degenerates in about twelve hours. *Id.* A woman's fertility cycle is intricately regulated by hormones. *Id.* at 1. In each cycle, the body is prepared for ovulation, fertilization, and implantation, all for the purpose of the formation of a new human being. *Id.* at 3. The



Fertility Awareness, thus, closely matches Sanger's criteria. The method is true contraception in that it prevents the meeting of the sperm and the oocyte.<sup>583</sup> It is highly reliable, working equally, if not more effectively, than the most reliable contraceptive methods.<sup>584</sup> It is relatively simple to use; women of all education levels can use the method with limited need for physician oversight. It is within the control of women, and, yet trainers emphasize that the method also requires the cooperation of the partner, and thus, both do assume responsibility. The method is inexpensive and safe; women are freed from the many serious medical risks, and couples are freed from the often substantial monetary costs associated with the chemicals, drugs, or devices pushed by the contraceptive approach devised under the influence of the population control movement.

In contrast, today's contraceptives fail all of Sanger's criteria other than reliability. Contraceptives carry serious safety concerns. Although developed by medical researchers and pharmaceutical companies, chemical contraceptives such as the pill, Norplant, or Depo-Provera, and devices such as IUDs, are not health care in the traditional sense.<sup>585</sup> Chemical contraceptives work by altering and, indeed, suppressing the natural and healthy operation of a woman's reproductive organs. Further, both chemical and non-chemical contraceptives create significant health risks for women.<sup>586</sup> Even if a specific injury does not occur, it cannot be in women's best interest to require them to insert long-term, dangerous devices into their bodies or to force chemicals throughout their body day in and day out for most of their adult years. Many contraceptives also are not simple to use, and most require a woman to be under constant supervision and monitoring by physicians or other service providers. Contraceptives are also costly; if state and federal governments were not subsidizing their

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necessary pattern of hormonal operations produces in turn the observable changes in a woman's cervical mucus. Lesson 7, *supra* note 580, at 2–4.

583. See WETZEL, *supra* note 52, at 103.

584. *Id.* at 104.

585. In her book *Population Policy and Women's Rights*, Dixon-Mueller spells out the many reasons why the "medicalization of contraceptive technology and services" is inconsistent with genuine health care for women. DIXON-MUELLER, *supra* note 413, at 47–50. Dixon-Mueller also explains that Sanger's agenda included "winning medical respectability" for artificial birth control. *Id.* at 41.

586. Health risks for the pill and IUDs have already been discussed. FRANKS, *supra* note 310, at 220–22. Norplant and Depo-Provera include the same risks as the pill, but include others as well. *Id.* at 227, 229. For example, Norplant includes additional risks stemming from its need to be removed by a physician. *Id.* at 227. Scar tissue often forms around the rods, making removal difficult and painful; sometimes the rods migrate, requiring invasive surgery to find and remove them. *Id.* Nerve damage and extensive scarring have also been reported. *Id.* Depo-Provera "has also been linked to increased rates of bone loss as well as to breast, endometrial and cervical cancers." *Id.* at 229.

costs, many women would be unable to afford the contraceptive approach to regulate births.

Sanger would also be concerned that the contraceptive approach has failed to generate respect for women.<sup>587</sup> Without doubt, the abuses imposed on women during the development of contraceptives constitute strong evidence of a deep-seated disrespect for women. In addition, the failure to generate respect is observable beyond the realm of research and development. A survey conducted by the Kaiser Foundation and *Seventeen* magazine noted the rising concern about young girls being coerced or pressured to engage in sexual activity.<sup>588</sup> The whole tenor of their message is such that girls and young women should be ready to, and will be expected to, engage in sexual activity, and it is therefore important that they be prepared to protect themselves. To the extent that condoms are not the chosen means for protection, women are expected to protect themselves by forcing chemicals and other foreign devices into their bodies for the purpose of suppressing their healthy reproductive systems. A significant consequence of both unprotected sex and the ingestion and implantation of harsh substances is loss of respect for women's fertility generally and an actual loss of fertility itself in many cases.<sup>589</sup>

Rather than authentic respect, the control movement approach has enabled men to expect women to submit to sex and to expect women to adopt the attitude that sexuality can be severed from parental responsibilities.<sup>590</sup> Rather than authentic respect, the approach has

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587. See SANGER, WOMEN, *supra* note 510, at 100 (stating that society will respect motherhood only after birth control is available to women).

588. VIRGINITY AND THE FIRST TIME, *supra* note 143, at 2 (finding that 91% of girls strongly agree or somewhat agree with the statement, "Girls are often pressured to have sex before they are ready" and that 52% of boys strongly agree or somewhat agree with statement, "Boys are often pressured to have sex before they are ready").

589. 24,000 women become infertile each year in the U.S. as a result of STDs. *CDC Press Release*, *supra* note 2. The implantation of IUDs can increase a woman's risk of contracting PID, a disease that impacts more than one million women a year. WETZEL, *supra* note 52, at 41; *Pelvic Inflammatory Disease (PID)*, *supra* note 90. Infertility occurs in 21% of PID cases. WETZEL, *supra* note 52, at 41.

590. FRANKS, *supra* note 310, at 249. Dixon-Mueller highlights the view of the pre-Sanger era feminists:

It was not that British feminists were oblivious to the problems of excessive childbearing; far from it. . . . But, in their public stance, feminists were concerned that artificial contraception would weaken whatever control women may have gained over their own persons by undermining their ability to regulate sexual access on the grounds of avoiding unwanted pregnancy. . . . Sexual and reproductive autonomy were closely linked in this view: a woman's control over childbearing would be achieved primarily through her control over marital sexual relations. A husband should respect his wife's wishes by practicing withdrawal or abstinence—that is, through *cooperative self-denial*.

DIXON-MUELLER, *supra* note 413, at 36.

forced women down a path of virtually lifelong dependency on drug and device manufacturers. It simply cannot be positive for women to understand a woman's normal and natural state as a problem. Rather, as explained by Franks, the female anatomy more properly must be considered

the material basis for, and expressive medium of, a life to be lived in full integrity. . . . To be free, women must live in harmony with the rhythms of their bodies, not in spite of them. . . . The social regime determined by [the control movement] will begin to crumble only if women begin valuing the power and beauty of their fertile bodies rather than engaging in a strange attempt to "control" what is inseparable from their own selves.<sup>591</sup>

The contraceptive approach pursued by Planned Parenthood and the population control movement therefore makes no sense when considered from the perspective of genuine health and well-being of women.

Fertility Awareness, thus, satisfies Sanger's criteria and does so more fully than the contraceptives promoted by Planned Parenthood, SIECUS, and the population controllers. It requires record-keeping and vigilance, but that would not deter Sanger from advocating for a particular method. Sanger was aware that even a simple process may still require vigilance.<sup>592</sup> Sanger, thus, sagely reiterates the need for vigilance, but also assures her readers that "precautions which may seem irksome at first soon become a matter of course and hygiene."<sup>593</sup> Further, in *Happiness in Marriage*, Sanger emphasizes the importance of couples being aware of and acting consistently with a woman's natural rhythms: "Such an intelligent study of the monthly cycle, which both intelligent mates should study and if possible keep a record of, would be an invaluable aid in the conquest of marital

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591. FRANKS, *supra* note 310, at 248. Moreover, the only potential downside to Fertility Awareness is not perceived as a negative by many women. The potential downside is the need to refrain from sexual activity from time to time. This is not considered a negative for women who have adopted this method of regulating births because it enables her to more accurately assess the motives of her partner. WETZEL, *supra* note 52, at 107-08 (acknowledging that Fertility Awareness requires serious commitment between partners, which theoretically could be used to screen out noncommittal mates). This is important to many women. Although Sanger's agenda was premised on the ideology that women want a lifestyle of total sexual freedom, wherein they are free to pursue sexual pleasures without concerns related to children who may be conceived, many women do not have this perspective. For many, use of sexuality is an expression of love and any child conceived should be accepted in love. Engaging in sexual activity without the full commitment of the partner to accept any child conceived is, in essence, a falsification of the sex act, and, further, it is fair to see such actions as mere use of the other. See FRANKS, *supra* note 310, at 249.

592. SANGER, *HAPPINESS*, *supra* note 555, at 213.

593. *Id.*

harmony.”<sup>594</sup> Sanger hoped to improve women’s lives via a scientifically sound method of regulating births.<sup>595</sup> She went down the road staked out by the population controllers because, at that time, it seemed like the surest route to the end she sought. If her vision and rhetoric are to be taken at face value, however, it seems clear that today she would recognize that the natural family planning path is heading more directly toward her hoped-for destination.

This conclusion undermines the positions of Planned Parenthood and SEICUS relating to the need for sex education in schools. Ready access to information about, and access to, contraceptives is not necessary for the protection of women. Parents have a duty to—and are competent to—provide a comprehensive education in sexuality to their children. That education does not need to include information about contraceptives to protect women’s rights or women’s reproductive health; it can, if parents choose to provide that information. But, scientific and other evidence makes it implausible to argue that a *need* for contraceptive information and access exists that would warrant encroachment on the parental right and duty to educate their children as to matters of sexuality and family life.

#### IV. IMPLEMENTING SUBSIDIARITY: PROVIDING PARENTS WITH TOOLS AND ENCOURAGEMENT

The analysis provided in this Article readily points away from further state promotion of school-based sex education. Effective sex education integrates morals and values into any and every discussion of the use of human sexuality. Because the choice of which morals and values to instill falls within the realm protected by parental rights, and because only parents and family can provide genuinely age-appropriate, gradual, and individualized education in sexuality, States that are serious about protecting the reproductive health of

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594. *Id.* at 156. Sanger focused on a different aspect of a woman’s cycle. Specifically, she was discussing the importance of blending the menstrual rhythm with other urges. *Id.* at 154. But she would agree that identification of the fertile period and abstinence during that period would enhance the marital relationship. Part of her point in this chapter is that the “desire curve” of many women likely has been “flattened out by excesses or sexual demands made upon the woman by ignorant but well-meaning husbands.” *Id.* at 155. She explains that intelligent husbands should study their wives’ rhythms and “seek to carry to consummation their own amorous desires” in accordance with the desires of their wives. *Id.* The result is the same with Fertility Awareness: periodic abstinence in accordance with the natural cycle of the woman. WETZEL, *supra* note 52, at 103. As to this type of periodic continence Sanger stated: “Such continence as is involved in dependence upon the so-called ‘safe period’ for family limitation will harm no one.” SANGER, WOMEN, *supra* note 510, at 112.

595. See SANGER, WOMEN, *supra* note 510, at 136–37 (urging women to press for scientific research of harmless birth control methods).

adolescents will move toward a parent-centered approach instead. To do otherwise demeans the dignity of the family and interferes with the right of citizens to pursue and achieve happiness.

Shifting to a parent-centered approach, however, will not rule out the need for state assistance to parents. Rather, proper implementation of the principle of subsidiarity posits that the State and schools must help ensure that parents and families assume and effectively carry out the responsibilities of parents and families. To that end, state assistance should take three main paths. First, States must send a message directly to parents, helping them to appreciate both the emerging statistics showing the serious long-term consequences associated with premature sexual activity—especially the real emerging concerns about the loss of fertility in young women, as well as the important contribution that they uniquely are able to provide in this arena.

Second, States must play a role in ensuring that appropriate educational materials and support are readily accessible to parents. Given the mounting evidence of the harms associated with contraceptives and the evidence of the reliability and other positive aspects of Fertility Awareness, it is reasonable that States should give some special emphasis to the development of materials that will help parents understand Fertility Awareness and thus enable them, if they choose, to include this information in the education they provide. Although much information is or can be made available over the internet, it also would be reasonable for States to ensure the availability of in-person support services for parents; perhaps this type of parental support could best be provided through the school systems.

Third, States must ensure that schools help parents by reinforcing clear and accurate messages regarding genuine reproductive health. In this respect, States must carefully consider the content of school health classes and/or mandated education relating to subjects such as HIV/AIDS. Surveys have revealed that little effort has been devoted to regulation of the precise content of sex education classes offered in schools in the past.<sup>596</sup> Greater attention in this area is necessary to prevent unnecessary infringement of the parental right. In this arena, the evidence overwhelmingly suggests that schools must clearly and expressly convey the basic and undeniable medical truth that refraining from sexual activity until one finds a lifelong partner is *certainly an attainable goal and clearly the surest way to protect and safeguard genuine reproductive health*. This message would promote the

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596. See 2000 KAISER STUDY, *supra* note 32, at 113 (reporting student answers to survey questions about content of sex education courses and the fact that less than 50% of respondents said their teachers strictly adhered to local or state guidelines).

important state interest in the health and well-being of its citizens, and, yet, it would not infringe on any set of values that a parent may wish to impart, including parents who may prefer a contraceptive-based message.

With carefully designed and implemented state assistance, parents can be trusted with the important task of safeguarding the reproductive health of their children. At the same time, effective assistance to parents will be substantially less costly for the State than continuing down the path of school-based sex education, thereby allowing the State to better carry out its legitimate educational tasks.